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SHOULD POLITICAL SUBDIVISIONS BE ACCORDED ELEVENTH AMENDMENT IMMUNITY?

Melvyn R. Durchslag*

INTRODUCTION

Local autonomy has recently returned to occupy center stage in constitutional discourse. But it was not always this way. While a, if not the, central focus of the 1787 constitutional debate concerned state autonomy from the assertion of federal authority,¹ the language of some early Marshall Court opinions seemed less than sympathetic to state autonomy concerns.² But beginning with its review of the Sherman Antitrust Act of 1890,³ the Supreme Court reordered the balance between federal and state power from that contemplated by the Marshall Court.⁴ Concerns for local autonomy even infected the Court's interpretation of individual rights during much of the period from the Reconstruction to the Warren Court era.⁵

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1. See, e.g., Robert F. Nagle, *Federalism as a Fundamental Value*: National League of Cities in Perspective, 1981 SUP. CT. REV. 81, 99-100 (discussing the Framers's views of the role of states in the federal system).

2. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824) (holding Congress's powers under Art. I, § 8 to be plenary); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418-22 (1819) (holding that Congress has wide discretion in determining the appropriate means to implement delegated powers).

3. 15 U.S.C. §§ 1-7 (1988 & Supp. II 1990).

4. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (stating that mining is not considered commerce); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that child labor standards are not a federal concern despite the destination of the goods produced), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (holding that sugar refining was not commerce "among the states" despite the fact that the refined sugar was destined to be shipped out of state).

5. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 352 (1963) (Harlan, J., concurring) (expressing concern with applying an entire portion of federal law to the states and recognizing the need for state autonomy); *Adamson v. California*, 332 U.S. 46, 66-67 (1947) (Frankfurter, J., concurring) (refusing to extend the Fifth Amendment right against self-incrimination to the states), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (giving great deference to state police power). See generally Melvyn R. Durchslag, *Feder-*

The Great Depression and the perceived need for a national economic response once more changed the tenor of the political debate. And the Court seemingly ended the constitutional debate over Congress's authority to regulate the national economy when, in *United States v. Darby*,⁶ it declared the Tenth Amendment to be nothing more than "a truism."⁷ Even direct federal imposition on states themselves seemed to cause few ripples⁸ until, in 1976, the Court declared Congress's attempt to extend the Fair Labor Standards Act of 1938⁹ to state and local governments unconstitutional as a violation of the once-thought moribund Tenth Amendment.¹⁰

The local autonomy/federalism subject was thus reopened for constitutional debate. Doctrinally, the debate has been kept alive by the Court's inability to agree on the extent to which protections against federal overreaching ought to rest on the protections afforded by the political process, as opposed to judicially articulated and enforced constitutional norms.¹¹ Now the debate is far more than doctrinal. In 1977, one year after *National League of Cities v. Usery*,¹² Professors Laurence Tribe and Frank Michelman independently reached the intriguing conclusion that *National League* can only be sensibly understood as a statement of individual constitutional entitlement to a basic level of services from local govern-

alism and Constitutional Liberties: Varying the Remedy to Save the Right, 54 N.Y.U. L. REV. 723 (1979) (criticizing the Court for contracting the scope of individual liberties in deference to state and local autonomy).

6. 312 U.S. 100 (1941) (holding that Congress has the power under the Commerce Clause to regulate such matters of national economy as child labor laws as long as they affect commerce or are necessary and proper to the regulation of commerce).

7. *Id.* at 124.

8. *See* *New York v. United States*, 326 U.S. 572 (1946) (holding that a state is not immune from federal tax on its sale of mineral waters). *But see* *Coyle v. Oklahoma*, 221 U.S. 559 (1911) (stating that Congress has no authority to impose the location for a state capital as a condition of admission into the Union).

9. 29 U.S.C. §§ 201-19 (1988).

10. *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

11. *Compare Garcia*, 469 U.S. 528 (1985) (overruling *National League*) with *New York v. United States*, 112 S. Ct. 2408, 2420 (1992) (distinguishing *Garcia* on the ground that "this is not a case in which Congress has subjected a State to the same legislation applicable to private parties"). Why that should matter given *Garcia's* reliance on the political process as adequate protection for the states' autonomy interests is not explained. *But see New York*, 112 S. Ct. at 2443-44 (White, J., concurring in part and dissenting in part) (explaining that the Act was passed at the insistence of the states' governors). *See also* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 652-81 (1993) (criticizing the Court's reasoning, if not the result, in *New York v. United States*).

12. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

ment.¹³ Moreover, local autonomy has become the centerpiece of republican constitutional theorists who see local governments, or even "sub-governments" (neighborhoods, for example), as the only venue in which republican discourse can occur.¹⁴ Federalism, a term which in its traditional setting has been used to express a relationship between the federal government and the states, consequently has taken on a new dimension. Because a political system founded on republican discourse can only occur within "a polity small enough for the entire citizenry to engage in face-to-face political discussion,"¹⁵ the relationship between the state and its local governmental units has also become a subject of increased interest. Indeed, it has become part and parcel of the larger debate on federalism values.¹⁶

It is where the federal/state, federal/local, and state/local conversations intersect that the Eleventh Amendment¹⁷ becomes of some interest, for current Eleventh Amendment doctrine contains elements of all three conversations. As to the first, the Eleventh Amendment — in oversimplified (and to that extent erroneous) terms — prohibits the exercise of federal judicial power directly against a state, thus creating an area of state autonomy from federal judicial authority. But as to the second, the Eleventh Amend-

13. Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L. J. 1165 (1977); Laurence Tribe, *Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) [hereinafter Tribe, *New Federalism*].

14. E.g., GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 91-118 (1967); MARK TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 11-12 (1988); Kathryn Abrams, *Law's Republicanism*, 97 YALE L. J. 1591, 1604 n.6 (1988); Richard H. Fallon, Jr., *What is Republicanism, and is it Worth Reviving?*, 102 HARV. L. REV. 1695, 1723-25 (1989); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 710-14 (1991).

15. James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 298 (1990).

16. See Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (studying the legal powers and social and political ramifications of the local government system) [hereinafter Briffault, *Part I*]; Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) (discussing local government law in relation to federal power) [hereinafter Briffault, *Part II*]; Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 718-32 (1978) [hereinafter Frug, *Power of the Purse*] (discussing the expansion of the federal courts' powers and their influence on society); Hoke, *supra* note 14, at 714-52 (arguing that federal preemption decisions impede state and local government and undermine citizens' rights to participate in the democratic process).

17. U.S. CONST. amend. XI. The text provides:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Id.

ment affords no similar immunity to any local governing unit below the state;¹⁸ at least as far as federal judicial power is concerned, local political subdivisions of the state have no autonomy. As I will demonstrate, the reason for this rather confusing distinction is the third element, the relationship between the state and its local political subdivisions — a relationship which is, and ultimately must be, defined according to state rather than federal norms.

Modern commentators have had very little good to say about the 1890 case of *Lincoln County v. Luning*,¹⁹ in which the Supreme Court drew a distinction between the immunity of the state and that of its political subdivisions.²⁰ In his 1987 treatise on the Eleventh Amendment, Professor John Orth noted that the “distinction in Eleventh Amendment law between cities and counties on the one hand and states on the other produces bizarre results.”²¹ Gerald Frug, perhaps the leading academic advocate for an increased role for local political subdivisions in our governing structure, described the *Lincoln County* doctrine as an “extraordinary anomaly.”²² In the only extensive law review commentary on the matter, a student essay in the *Duke Law Journal* some fifteen years ago argued that the rule of *Lincoln County* “furthers no [E]leventh [A]mendment goals and is contrary to sound principles of federalism.”²³

There is something to be said for these criticisms. At the same time the Court has continued its adherence to *Lincoln County*, in other contexts it uses federalism principles to protect local political subdivisions from federal authority, both judicial and legislative.²⁴

18. *Lincoln County v. Luning*, 133 U.S. 529 (1890) (distinguishing the immunity of states from political subdivisions). Ironically, *Lincoln County* was decided the same day as *Hans v. Louisiana*, 134 U.S. 1 (1890), a case in which the Court significantly expanded the Eleventh Amendment by holding that, the text notwithstanding, a state's Eleventh Amendment immunity extends to suits against a state by any person, citizen or noncitizen. It did so by holding that the Eleventh Amendment constitutionalized a general principle of state sovereign immunity. *Id.* at 21.

19. 133 U.S. 529 (1890).

20. *Id.* at 530.

21. JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES* 119 (1987) [hereinafter ORTH, *JUDICIAL POWER*].

22. Frug, *Power of the Purse*, *supra* note 16, at 756. See also Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 57 n.23 (1990) [hereinafter Jackson, *One Hundred Years of Folly*] (describing *Lincoln County* as a “doctrinal anomaly”).

23. Margreth Barrett, Comment, *The Denial of Eleventh Amendment Immunity to Political Subdivisions of the States: An Unjustified Strain on Federalism*, 1979 DUKE L.J. 1042, 1069 [hereinafter Barrett, *Immunity to Political Subdivisions*].

24. *Compare* Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990) (stating that a bi-state entity created to operate certain transportation facilities enjoys Eleventh Amendment

In *San Antonio Independent School District v. Rodriguez*,²⁶ the Court refused — largely for reasons of federalism²⁸ — to find that Texas's local property tax scheme for financing public schools violated the Equal Protection Clause despite wide disparities in the educational resources available to local school districts. In *National League*,²⁷ the Court suggested that because local political subdivisions derive their authority and power from their respective states "and are thus 'subordinate arms' of state government,"²⁸ federal interference in their decision-making is protected by the Tenth Amendment. All of this, however, has had no influence on how the Court has decided cases in which local governmental units claim the Eleventh Amendment sovereign immunity defense in federal court.

The apparently unanimous and certainly consistent adherence to a doctrine which has been as widely criticized as *Lincoln County* and which, on the surface, is inconsistent with concerns for values of federalism expressed in other constitutional contexts would suggest at least doctrinal incoherence (not surprising under the Eleventh Amendment), if not blind, slavish adherence to outworn precedent. However, when one focuses on the history and structure of the variety of local governmental units and how that meshes with both historical and contemporary justifications for state sovereign immunity under the Eleventh Amendment, the arguments, which some might think compel a reconsideration of *Lincoln County*, are far less persuasive than they appear at first blush. Moreover, the countervailing concern for preserving a federal remedy for victims of a local gov-

immunity, although it was waived in this case) with *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) (holding that "[i]f an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, . . . the [Eleventh] Amendment should not be construed to immunize such an entity") and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (holding that a school board is not immune from suit). Cf. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (holding that a city with "home rule" status is not immune from federal antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943)).

25. 411 U.S. 1 (1973).

26. *Id.* at 40-44; see also *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 866-67 (1987) (Stevens, J., dissenting) (arguing that the Takings Clause should not be interpreted so as to disable local governments from performing their regulatory functions); *First English Lutheran Evangelical Church v. Los Angeles County*, 482 U.S. 304, 340-41 (1987) (Stevens, J., dissenting) (holding that the Court's Takings Clause jurisprudence will inhibit local regulatory actions beneficial to the public welfare).

27. 426 U.S. 833 (1976).

28. *Id.* at 844 n.20; see also *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 60-71 (1982) (Rehnquist, J., dissenting) (arguing that local political subdivisions should have the same immunity from federal antitrust liability that states enjoy).

ernment's excesses may outweigh any real or symbolic benefits which accrue to local political subdivisions by extending them full Eleventh Amendment immunity.

Part I of this Article looks at the *Lincoln County* decision itself and attempts to place that decision in its historical and doctrinal context. Viewed in this light, *Lincoln County* hardly seems anomalous; this is certainly not the case when it is viewed through the eyes of the nineteenth century Justices who decided the case. Part II analyzes the three major textual or structural arguments which might support overruling *Lincoln County*, but concludes that none are persuasive. Part III looks at the issue in a more functional way, assessing arguments which attempt to establish an identity between the state and its political subdivisions, both in terms of functions performed and the fiscal relationship between them. This part also briefly assesses the consistency between *Lincoln County* and local government as the venue for the realization of republican values of self-government. Finally, Part IV argues that if *Lincoln County* is to be reconsidered, the likely result will be the sacrifice of legal relief for violations of individual liberties under Section 1983 of the Civil Rights Act²⁹ and *Monell v. Department of Social Services*.³⁰

I. LINCOLN COUNTY IN CONTEXT

The Supreme Court in *Lincoln County*³¹ devoted four paragraphs to enunciating and explaining its ruling that the Eleventh Amendment does not extend its jurisdictional proscription to local political subdivisions.³² Three reasons emerge from those four paragraphs. The first is precedent: "[T]he records of this court for the last thirty years are full of suits against [political subdivisions], and it would seem as though by general consent the jurisdiction of the Federal courts . . . had become established."³³ The second also derives from precedent, but of a somewhat different nature: based on *In Re Ayers*,³⁴ in which the Court limited the applicability of the Eleventh Amendment to cases in which the state is the real party in interest, the *Lincoln County* Court said that since the county was not the

29. 42 U.S.C. § 1983 (1988).

30. 436 U.S. 658 (1978).

31. *Lincoln County v. Luning*, 133 U.S. 529 (1890).

32. *Id.* at 530-31.

33. *Id.* at 530.

34. 123 U.S. 443 (1887).

state, the Eleventh Amendment was inapplicable.³⁵ The third reason is the most significant to a historical understanding (and justification) of *Lincoln County*: the Court's clarification of the state and its political subdivisions as being totally distinct entities.³⁶ This is reflected in the somewhat cryptic statement that "[the county] is a part of the State only in that *remote sense* in which any city, town, or other municipal corporation may be said to be a part of the State."³⁷

It is difficult to understand the Court's first two reasons. As to the first, while it is true that the Court had consistently decided that individuals could sue local political subdivisions despite the Eleventh Amendment,³⁸ it is also true that the Court had previously upheld, admittedly somewhat less consistently, individual suits against states.³⁹ Consequently, if the Court felt free that same day to ignore this other group of precedents in deciding *Hans v. Louisiana*,⁴⁰ it

35. *Lincoln County*, 133 U.S. at 530.

36. *Id.*

37. *Id.* (emphasis added).

38. *E.g.*, *Scotland County v. Hill*, 132 U.S. 107 (1889) (allowing a suit against a county to recover on bond coupons that it issued); *Smith v. Bourbon County*, 127 U.S. 105 (1888) (allowing a suit against a county to compel issuance of bonds); *Nemaha County v. Frank*, 120 U.S. 41 (1887) (holding that interest coupons are the obligation of the county); *Ackley School Dist. v. Hall*, 113 U.S. 135 (1885) (allowing a suit against a school district for recovery of the principal and interest due on a bond); *Blair v. Cuming County*, 111 U.S. 363 (1864) (allowing a suit against a county to recover on bonds); *Chickaming v. Carpenter*, 106 U.S. 663 (1883) (allowing a suit against a township to recover on unpaid bonds and coupons); *Thompson v. Perrine*, 106 U.S. 589 (1883) (allowing a suit against a town to recover on unpaid bonds); *Davenport v. Dodge County*, 105 U.S. 237 (1882) (allowing a suit against a county to recover on bond coupons); *Cromwell v. County of Sac*, 96 U.S. 51 (1877) (allowing a suit against a county for recovery on unpaid bonds).

39. *E.g.*, *Rolston v. Missouri Fund Comm'rs*, 120 U.S. 390 (1887) (allowing a suit to compel a state officer to perform a nondiscretionary act), *overruled in part by* *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Barry v. Edmunds*, 116 U.S. 550 (1886) (allowing a suit against a state for trespass when, after refusing to accept the state's own bond coupon in tax payment, a state official entered the plaintiff's land and removed his horse); *Allen v. Baltimore O. R.R.*, 114 U.S. 311 (1885) (granting an injunction against a state after the state refused to accept its own bond coupons in tax payment); *Virginia Coupon Cases*, 114 U.S. 269 (1885) (declaring unconstitutional a statute forbidding acceptance of the state's own bond coupons in tax payment); *Clark v. Barnard*, 108 U.S. 436 (1883) (holding that a state waived its immunity when it intervened as a claimant, not when it merely appeared to protest jurisdiction); *Board of Liquidation v. McComb*, 92 U.S. 531 (1873) (issuing a writ of mandamus compelling a state official to perform a nondiscretionary duty); *Davis v. Gray*, 83 U.S. (16 Wall) 203 (1872) (allowing a suit in equity seeking to enjoin a state from granting certain lands to third parties after allegedly granting them to a railroad).

40. 134 U.S. 1 (1890) (denying federal jurisdiction in a suit brought against a state by a resident citizen for reasons of sovereign immunity). Several authors have described *Hans* as a case which grew out of the "Compromise of 1877," which resulted in the selection of Rutherford B. Hayes as President over Samuel J. Tilden. The selection was made by an Electoral Commission

could have just as easily ignored "the last thirty years"⁴¹ and decided *Lincoln County* the other way. As for the second argument, *In Re Ayers*⁴² merely held that the state has to be the real party in interest in order to implicate the Eleventh Amendment. The Court had nothing whatsoever to say about whether the state and its political subdivisions were sufficiently identified, either *de facto* or *de jure*, to justify holding that a suit against a political subdivision is a suit against the state. That still leaves the third reason given by the *Lincoln County* Court, that the state is a totally distinct entity from its political subdivisions. In order to assess this reason, *Hans* must be briefly revisited. In doing so, it is also necessary to briefly discuss the concept of sovereignty and how the 1890 legal mind viewed the sovereignty of local political subdivisions. For it is sovereignty which ultimately undergirds *Hans* and explains *Lincoln County*.⁴³

consisting of ten elected representatives, five senators, five House members, and five Supreme Court Justices. The major agreement which "bought" Southern support for Hayes was the promise of home rule for the South, which meant no more federal interference — executive or legislative — in the affairs of the southern states. The judiciary, seeing no possibility of enforcing their orders in such a political environment, followed suit. In the fiscal arena, this meant no judicial interference with attempts to repudiate debts contracted by the newly dispossessed reconstruction legislatures. See ORTH, JUDICIAL POWER, *supra* note 21, at 47-109 (discussing American law and federalism during the Reconstruction era); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1976-91 (1983) (discussing repudiation, the Court's reactions, and the ensuing "Constitutional crisis"). Professor Orth explained the exception for local political subdivisions as the inability of "[s]parsely settled counties in politically insignificant states [to] command the sympathies of the highest powers in the nation." ORTH, JUDICIAL POWER, *supra* note 21, at 118. Judge Gibbons described it as an attempt by the Court to keep the securities markets stable. Gibbons, *supra*, at 2001-02.

41. *Lincoln County*, 133 U.S. at 530.

42. 123 U.S. 443 (1887).

43. Criticism of *Hans* has occupied a number of scholars and has filled law review and book pages for many years. A concern for time and space permits only a few citations. E.g., CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972); ORTH, JUDICIAL POWER, *supra* note 21; MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 139-54 (1980); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978) [hereinafter Field, *Immunity Doctrines*]; Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978) [hereinafter Field, *Congressional Imposition*]; Gibbons, *supra* note 40; Jackson, *One Hundred Years of Folly*, *supra* note 22; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1 (1988) [hereinafter Jackson, *Sovereign Immunity*]; Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Gene R. Shreve, *Letting Go of the Eleventh Amendment*, 64 IND. L. J. 601 (1989). Some of the authors, most notably Professors Amar, Field, Jackson, Orth, and Judge Gibbons, entirely reject the notion that the Eleventh Amendment "constitutionalized" state sovereign immunity.

However, one reads the conflicting historical evidence regarding whether the Framers expected state sovereign immunity to survive the specific language of Article III, it is undeniable that there was

in 1787 . . . a robust debate over the nature of sovereignty. Certain Federalists . . . were out-spoken in their conviction that sovereignty was exclusively vested in the people of the nation as a whole. The anti-Federalists were equally fervid in their contention that the states possessed sovereignty that ought not be compromised by constitutional union.⁴⁴

This debate was not resolved in Philadelphia. The "great" opinions of the Marshall Court — *McCulloch v. Maryland*,⁴⁵ *Cohens v. Virginia*,⁴⁶ *Martin v. Hunter's Lessee*,⁴⁷ and *Gibbons v. Ogden*⁴⁸ — carried that debate from the convention to the federal judiciary. No less a part of that debate were *Chisholm v. Georgia*⁴⁹ and, subsequently, *Hans v. Louisiana*.⁵⁰ To be sure, *Chisholm* and *Hans* each had a far narrower focus than cases such as *McCulloch* and *Gibbons*. The former were cases where states had defaulted on obligations they had issued and were subsequently sued by individual creditors. The major factual difference between *Hans* and *Chisholm* was that *Chisholm* was a nonresident of Georgia and claimed federal jurisdiction as a result of diversity of citizenship⁵¹ while *Hans*, a resident of Louisiana, relied on the Contracts Clause in asserting

Others such as Professor Nowak accept state sovereign immunity as a constitutional proposition but argue that Congress can waive that immunity pursuant to its constitutionally-granted legislative authority. Professors Massey and Redish part company with Professor Nowak. Professor Redish argues that *Hans* is simply wrong in its extension of the Constitution's language but argues that Congress has no power to waive immunity in suits against the state by citizens of other states. Professor Massey agrees with Professor Redish but argues that questions of state immunity beyond the Eleventh Amendment's text should be resolved under the Tenth Amendment. Professor William Marshall, on the other hand, seems unconvinced by any of the arguments which criticize *Hans*, and thus is prepared to support the Court's current stance. See William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989).

44. Massey, *supra* note 43, at 97.

45. 17 U.S. (4 Wheat.) 316 (1819) (upholding the Constitutional grant of power to Congress to establish a second bank of the United States).

46. 19 U.S. (6 Wheat.) 264 (1821) (holding that federal courts may exercise jurisdiction over the states when federal questions are raised).

47. 14 U.S. (1 Wheat.) 304 (1816) (holding that federal courts have the power to review the constitutionality of state government actions).

48. 22 U.S. (9 Wheat.) 1 (1824) (using a broad construction of the First Amendment to hold that Congress's power to regulate commerce extends to any activity which even indirectly affects interstate commerce).

49. 2 U.S. (2 Dall.) 419 (1793) (upholding federal jurisdiction in a suit brought against a state by a nonresident individual without the state's consent).

50. 134 U.S. 1 (1890).

51. *Chisholm*, 2 U.S. (2 Dall.) at 420.

federal question jurisdiction.⁵² The questions, however, were essentially the same — whether the constitutional structure, informed by concerns for preserving state sovereignty, permitted an interpretation of Article III that allowed an individual to sue an unconsenting state. Like *McCulloch*, then, both *Chisholm* and *Hans* rested on structural assumptions about the intersection of federal authority and state autonomy.⁵³ That the essential dispute was over conflicting “sovereignties” is evident from the opinions in both *Chisholm* and *Hans*. James Wilson — who argued so strongly for ratification in the Pennsylvania Constitutional Convention — wrote as Justice Wilson in *Chisholm*, that the “question . . . [is] no less radical than this — ‘do the People of the *United States* form a Nation?’ ”⁵⁴ Chief Justice John Jay echoed Justice Wilson’s federalist conceptions of sovereignty, noting that the people acting as sovereigns created a governmental structure which bound states to the dictates of federal law, thus allowing a citizen to sue a state in federal court.⁵⁵ On the other side, Justice James Iredell, the lone dissenter in *Chisholm*, wrote that “[e]very State in the *Union* in every instance where its sovereignty has not been delegated to the *United States*, I consider to be completely sovereign. . . . The *United States* are sovereign as to all the powers of Government actually surrendered: Each state in the *Union* is sovereign as to all the powers reserved.”⁵⁶

Nearly one hundred years later, Justice Joseph Bradley, speaking for the Court in *Hans*, said that the *Chisholm* Court had gotten it

52. *Hans*, 134 U.S. at 10.

53. A number of scholars have disputed the *Hans* Court’s conclusion that the Eleventh Amendment constitutionalized sovereign immunity. See *supra* note 43 (citing authors who have criticized the *Hans* decision). They argue instead that the Eleventh Amendment was designed only to restrict federal jurisdiction based on the identity of the parties. In terms of sovereign immunity, Professors Field and Jackson argue that *Chisholm*’s mistake, if there was one, was its failure to recognize the state sovereign immunity defense as a matter of federal common law. See Field, *Congressional Imposition*, *supra* note 43; Field, *Immunity Doctrines*, *supra* note 43; Jackson, *One Hundred Years of Folly*, *supra* note 22; Jackson, *Sovereign Immunity*, *supra* note 43.

54. *Chisholm*, 2 U.S. at 453.

55. *Id.* at 471. This interpretation of our constitutional history and structure was reiterated by Chief Justice John Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Arguing that the federal government was created by the sovereign states voluntarily ceding powers to it, the state of Maryland asserted that federal power should be narrowly construed in deference to the sovereign prerogatives of the state. The Court, however, had a different version of the creation of the federal government and the source of its powers. Chief Justice Marshall argued that the federal government was created by the sovereign people who allocated authority between the federal government and the states, and there was consequently no reason to narrowly construe federal authority; the states, not being the sovereigns in our constitutional scheme, had no greater claim to governmental authority than did the federal government. *Id.* at 404-06.

56. *Chisholm*, 2 U.S. at 435 (Iredell, J., dissenting).

all wrong, misapprehending the locus of sovereignty and thus reaching the wrong conclusion as to whether the structure of the Constitution contemplated a state's sovereign immunity.⁵⁷ Quoting Alexander Hamilton's *Federalist No. 81*, Justice Bradley wrote:

It is inherent in the nature of [a state's] sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.⁵⁸

Little has changed in the last century; the concept of state sovereignty *simpliciter* remains a part of Eleventh Amendment jurisprudence.⁵⁹

57. *Hans v. Louisiana*, 134 U.S. 1, 12 (1890).

58. *Id.* at 13.

59. One illustration is the Eleventh Amendment's prohibition against suing a state in its own name even for injunctive relief, despite the Court's adherence to the prospective/retrospective relief distinction when state officers are sued in their official capacities. Compare *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945) (stating that in a suit for recovery of money from the Treasury, the state is a real party in interest and is protected by the Eleventh Amendment) and *Missouri v. Fiske*, 290 U.S. 18 (1933) (holding that a state's immunity extends to suits which are *quasi in rem*, absent a waiver by the state) with *Edelman v. Jordan* 415 U.S. 651 (1974) (holding that a judgment to be paid out of a state treasury is barred by the Eleventh Amendment even though the state is not a party). But cf. *Hafer v. Melo*, 112 S. Ct. 358 (1991) (stating that the Eleventh Amendment does not bar a damage claim against a state officer if the suit is filed against her in her individual capacity, even for actions taken in her official capacity). When a state officer is sued to enjoin enforcement of an unconstitutional statute, the "real party in interest" is the state just as much as it is when a state officer is sued for retrospective monetary relief to be paid from the state treasury. This anomaly can only be resolved by creating a fiction that the state officer's actions are *ultra vires* when attempting to enforce an unconstitutional statute. The Court did just this in *Ex Parte Young*, 209 U.S. 123 (1908). See generally LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-27, at 189-92 (2d ed. 1988) [hereinafter TRIBE, *CONSTITUTIONAL LAW*] (discussing the significance of *Ex Parte Young*). However, this fiction does not purge the anomaly. The state, like any corporation, cannot act except through its officers, whether they be executive, legislative, or judicial. When enforcing a state statute, these officers are acting for the state and with the state's explicit authority. Therefore, the only basis for the distinction is that it is inconsistent with traditional notions of sovereignty to force a state to defend a suit when it has not agreed to do so. See *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (holding that the Eleventh Amendment prohibits suits in federal court by foreign nations against states despite a lack of textual proscription); *Ex Parte New York*, 256 U.S. 490 (1921) (holding that admiralty jurisdiction is barred by the Eleventh Amendment despite the fact that such suits are neither in law nor equity). But cf. *Nevada v. Hall*, 440 U.S. 410 (1979) (holding that the Eleventh Amendment does not prohibit one state's citizens from suing another state in the courts of the former party's residence). Dissenting in *Nevada v. Hall*, Justice Harry Blackmun found an interstate sovereign immunity in general principles of federalism. *Id.* at 430-31 (Blackmun, J. dissenting). In a separate dissent, Chief Justice William Rehnquist also found an interstate sovereign immunity but seemed to rely more on the Eleventh Amendment and the reasoning of *Hans* than on more general principles of structural federalism. *Id.* at 432-43 (Rehnquist, C.J., dissenting).

According to *Hans*, because the Eleventh Amendment purports to protect a state's sovereignty recognized by the common law, it is important to attempt a working definition of that concept. The Court has often used the word sovereignty, but it has never explicitly defined it. Justice Joseph Story, in his work *Constitution*, defined sovereignty as "the union and exercise of all human power possessed in a state; it is the power to do everything in a state without accountability."⁶⁰ Justice Oliver Wendell Holmes, attempting to justify sovereign immunity, defined a sovereign as one who has the power to promulgate positive law.⁶¹ While many scholars question whether sovereignty is a relevant concept in a system where individuals can peacefully alter the government they created,⁶² they seem to agree that where the concept is used, it must be defined in its classical liberal sense: the ability of a political entity to prescribe the rules of order and behavior for others (laws) without having to (1) look to higher authority as a source of power or (2) be subject to the oversight of that higher authority.⁶³ Certainly the federal government possesses these characteristics; at least that much can be reckoned from *Chisholm*. *Hans*, however, held that the states possess these attributes as well,⁶⁴ despite the "solecism of *imperium in imperio*."⁶⁵ If states are "sovereign" despite the authority of the federal government, why are local political subdivisions — which, after all, exercise state *political* authority — not equally sovereign and

60. JAMES MARSHALL, *SWORDS AND SYMBOLS: THE TECHNIQUE OF SOVEREIGNTY* 5 (1969) (quoting Justice Story).

61. "A sovereign is exempt from suit . . . on the . . . ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (emphasis added).

62. See generally F.H. HINSLEY, *SOVEREIGNTY* (1966); Amar, *supra* note 43, at 1430-55 (arguing that Americans redefined the locus of sovereignty from the "King-in-Parliament" to the people); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 346-59 [hereinafter Rapaczynski, *From Sovereignty to Process*] (agreeing with Amar that sovereignty, as the Framers understood that term, rested with the people rather than with any government, but also arguing that "sovereignty [is] of questionable value both as an analytical tool and as a norm defining a desirable feature of political organization"); Yves R. Simon, *Sovereignty in Democracy*, in *IN DEFENSE OF SOVEREIGNTY* 241 (W. Stanjeiwicz ed., 1969) (suggesting that while the people possess ultimate sovereignty in a democratic state, the government is sovereign under a "coach-driver" theory; i.e., the government drives the coach and thus appears to be in control of its destination but in reality is driving the "coach" only in accordance with the peoples' instructions).

63. Rapaczynski, *From Sovereignty to Process*, *supra* note 62, at 347-48. See also Jacques Maritain, *The Philosophic Attack*, in *IN DEFENSE OF SOVEREIGNTY* 41 (W. Stanjeiwicz ed., 1969) (stating that "[s]overeignty equals full autonomy or right to decide without appeal").

64. *Hans v. Louisiana*, 134 U.S. 1, 16 (1890).

65. Amar, *supra* note 43, at 1436.

thus entitled to sovereign immunity under the Eleventh Amendment? This was the essential question posed by *Lincoln County* in 1890.

The simple answer, of course, is that these entities are not the state. Historically, most governance functions were exercised by the state, not by local political subdivisions. During the very early days of the Republic, most cities were more concerned with managing their properties than with exercising regulatory or taxing power for the general welfare.⁶⁶ This was not lost on the Justices who decided *Chisholm*. Chief Justice Jay, in supporting his argument that the states possessed no sovereign immunity under Article III, analogized the status of the state to that of its local political subdivisions: "In this city [Philadelphia], there are forty odd thousand free citizens, all of whom may be collectively sued by any individual citizen. In the State of Delaware, there are fifty odd thousand free citizens, and what reason can be assigned why a free citizen who has demands against them should not prosecute them?"⁶⁷ Justice Iredell, the lone dissenter in *Chisholm* and whose opinion most informed the result in *Hans*, specifically distinguished the state from local political subdivisions: "[A s]tate cannot be considered upon the same footing as the municipal corporations I have been considering"⁶⁸ While neither Justice explained his reasons, it was evident that the general understanding at the time was that local political subdivisions were just a variety of corporations which owed their existence to a charter granted by the "sovereign"; that is, the state. Thus, in terms of sovereignty, political subdivisions did not resemble the state. Unlike the states themselves, these political subdivisions were beholden to a higher governmental authority for their power and accountable to that higher governmental authority for its exercise.⁶⁹ In fact, the distinction which the Supreme Court drew between private and public corporations in *Trustees of Dartmouth College v. Woodward*⁷⁰ removed any independent *raison d'être* from

66. See HENDRIC HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870, at 192-204 (1983) (discussing the formulation of the corporation of the City of New York).

67. *Chisholm v. Georgia*, 2 U.S. 419, 472 (1793).

68. *Id.* at 448 (Iredell, J., dissenting).

69. Cf. Briffault, *Part I, supra* note 16, at 93 n.385 ("In the absence of a specific congressional grant of immunity, the most local governments can aspire to is autonomy, not sovereignty.").

70. 17 U.S. (4 Wheat.) 518 (1819) (using the Contracts Clause to hold that the state of New Hampshire could not force Dartmouth College to become a public institution in contravention of its charter).

a municipal corporation, making it even less "sovereign" than a private corporation.⁷¹

This perception of local political subdivisions as mere chartered corporations remained largely unchanged during the nineteenth century. When *Lincoln County* was decided in 1890, the legal relationship between a state and its political subdivisions was that of subservience by the latter to the former. The predominate view of local political subdivisions was embodied in "Dillon's Rule," which stated that municipal corporations possessed only those powers *expressly* delegated to them by the state and could exercise only those authorities which were *absolutely necessary* to effectuate those powers.⁷² In the same year that the Court decided *Hans* and *Lincoln County*, the fourth edition of John Dillon's treatise reasserted the sovereignty of the state and the subservience of its local governmental units. Dillon stated that "the power of the legislature over [municipal corporations] is supreme and transcendent: it may . . . erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require."⁷³

71. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1099-1109, 1120-49 (1980) [hereinafter Frug, *The City*] (describing the public/private distinction as it is applied in the context of state/local relations and powerfully attacking the persistence of that distinction). See generally HARTOG, *supra* note 66, at 192 ("The trick was to divide entities that derived power from the state from those that held rights against the state.").

72. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 89, at 145 (Boston, Little Brown) (4th ed. 1890). This view was not universal during that time period. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (8th ed. 1927) (suggesting that an inherent right of local self-government exists independently of the state and its desires). The Michigan Supreme Court recognized an inherent right of local self-government in *People ex rel LeRoy v. Hurlbut*, 24 Mich. 44 (1871). While it has never been explicitly overruled, the principle of local self-government is no longer itself a limitation on state power but is used in interpreting ambiguous constitutional provisions. See *Brouwer v. Kent County Clerk*, 377 Mich. 616, 651-52 (1966) (discussing local government authority in relation to the state constitution); see also Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WISC. L. REV. 83 (analyzing differences in the theories, backgrounds, and motivations between Judge Dillon and Professor Cooley). See generally Howard L. McBain, *The Doctrine of an Inherent Right of Self-Government*, 16 COLUM. L. REV. 190 (1916) (describing the extent to which courts apply the doctrine of an inherent right of local self-government).

73. DILLON, *supra* note 72, at 93. See also HOWARD S. ABBOTT, A SUMMARY OF THE LAW OF PUBLIC CORPORATIONS 49 (1908) (stating that public corporations are subject to the will of the state); 1 CHARLES F. BEACH, JR., COMMENTARIES ON THE LAW OF PUBLIC CORPORATIONS, INCLUDING MUNICIPAL CORPORATIONS AND POLITICAL OR GOVERNMENTAL CORPORATIONS OF EVERY CLASS § 538, at 549 (Indianapolis, Bowen-Merrill 1893) (asserting that public corporations are "mere instrumentalities" of the state). One might argue that my definition of sovereignty is too crabbed and that it assumes a "sovereign" must have the whole "bundle of sticks" or none at all. Indeed, the definition I have used virtually ensures that local governments cannot qualify as

Not possessing the major attribute of sovereignty, that of independent lawmaking authority, local political subdivisions generally did not possess sovereign immunity either, unless the statute or state charter which created them could be interpreted as conferring that immunity.⁷⁴ The only recognized exception was when a local political subdivision was engaged in an activity because the state had imposed on it a duty or obligation to perform that activity; only then would the common law recognize a sufficient identity with the state to permit the *state's* sovereign immunity to attach to the local unit.⁷⁵ Far from being an anomaly, then, *Lincoln County* follows logically from the Court's conclusion in *Hans* that the Eleventh Amendment constitutionalized one of the major attributes of sovereignty recognized by the common law: sovereign immunity.⁷⁶

That *Lincoln County* may have been perfectly consistent with *Hans* when it was decided does not, of course, justify the Court's continued adherence to it. Our changing views of local political subdivisions, the expansion of their functions, the changes in the legal status of some local governmental units brought about by a variety of home rule powers and other immunities from state control, the growth and development of constitutional values of federalism beyond parochial notions of sovereignty, and the strength and persistence of critical commentary of *Hans* require yet another look at *Lincoln County*. The next section analyzes the arguments supporting Eleventh Amendment protection for local political subdivisions.

sovereigns. Home rule provisions may make that argument plausible today, but it was not so when *Lincoln County* was decided. See *infra* notes 94-128 and accompanying text (discussing the legal structure of political subdivisions). Whatever definition of sovereignty one might use, it at least must include the right of independent existence. Local governments did not have that attribute in 1890 in any but a handful of jurisdictions.

74. 2 DILLON, *supra* note 72, §§ 935-89, at 1139-1217.

75. *Id.* § 949, at 1157-58; ABBOTT, *supra* note 73, at 529.

76. Professor Cass Sunstein has argued that it was characteristic of the "era" in which *Hans* was decided for the Court to constitutionalize the common law. Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) [hereinafter Sunstein, *Legacy*]. The cases in which this occurred were largely substantive due process cases, and the common law of property and contract was used as a "baseline" for constitutional adjudication. *Id.* While neither *Hans* nor *Lincoln County* raised precisely that issue, their method of analysis seems identical.

II. TEXTUAL ARGUMENTS IN FAVOR OF PROTECTING POLITICAL SUBDIVISIONS

A. *The Meaning of "State"*

The first two arguments in favor of allowing Eleventh Amendment protection to local political subdivisions start with the text and structural assumptions of the Constitution. The first argument is classically textual. It asserts that since the word "state," as it appears in other parts of the Constitution, includes political subdivisions, this same meaning should attach when it is used in the Eleventh Amendment. This is based on the more or less universal rule of interpretation that a word used several times in the same document should be given the same meaning each time it is used.⁷⁷

It is true that "state" is most often interpreted to include political subdivisions. The double jeopardy clause of the Fifth Amendment,⁷⁸ the Equal Protection and Due Process Clauses of the Fourteenth Amendment,⁷⁹ the Fifteenth Amendment,⁸⁰ the three subsections of Article I, section 10,⁸¹ and, by way of judicial interpretation, the dormant side of the Commerce Clause⁸² all give "state" such a meaning. There are, however, two difficulties with this textual argument. First, and most significantly, when the word "state" is used in Article III, section 2, it cannot be interpreted to include political subdivisions.⁸³ The Eleventh Amendment was designed to and did

77. HENRY C. BLACK, *INTERPRETATION OF THE LAWS* § 53, at 145 (2d ed. 1911). See *Adamson v. California*, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (stating that the term "due process," which appears in both the Fifth and Fourteenth Amendments, compels a meaning of due process independent of the first eight amendments); see also *Roe v. Wade*, 410 U.S. 113, 158 (1973) (holding that since the word "person" can have only a post-natal meaning in other provisions of the Constitution, it must have that meaning in section 1 of the Fourteenth Amendment as well).

78. See *Waller v. Florida*, 397 U.S. 387 (1970) (holding that a conviction by both a state and its municipality for the same crime violates the double jeopardy provision of the Fifth Amendment).

79. See *Owen v. City of Independence*, 445 U.S. 622 (1980) (holding that the word "state" in the Due Process Clause of the Fourteenth Amendment includes political subdivisions); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (interpreting "state" in the Equal Protection Clause as including political subdivisions).

80. *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (holding that a city election process violated the Fifteenth Amendment).

81. U.S. CONST. art. I, § 10.

82. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (holding that a city milk regulation violated the dormant Commerce Clause).

83. Both paragraphs one and two of that section refer to "states." Obviously, Article III does not contemplate that the Supreme Court should exercise original jurisdiction in a dispute between the City of Philadelphia and the King of Prussia. Nor does diversity jurisdiction exist when a

correct a perceived misreading of that provision. It would at best be counter-intuitive to suggest that the word "state" should have a broader meaning in the corrective amendment than it does in the subsequently corrected text.

Second, the analogy between the Eleventh Amendment, which limits *federal* power vis-à-vis the states, and the other provisions where the word "state" is used, which limit *state* power vis-à-vis individuals, is imperfect at best. Neither at the present time nor during the era of *Lincoln County* has anyone doubted a state's ability to establish local political subdivisions and to delegate to those local units the coercive powers of regulation and taxation, powers which most often implicate individual liberties. It would hardly be plausible to interpret the word "state" to exclude state-created political subdivisions when individual liberties are at stake. To do so would be tantamount to giving a state the option to suspend federally guaranteed rights through the use of their admitted power to delegate police, taxing, and service distribution powers to local governmental units.⁸⁴ This does not necessarily mean, however, that a local political subdivision must also be treated the same as a state for purposes of the Eleventh Amendment, where individual liberties are not implicated.

B. *The Text of the Tenth Amendment*

A stronger textual argument narrows the focus to the language and purpose of the Tenth Amendment:⁸⁵ If the word "state" as used in the Tenth Amendment includes political subdivisions, the same interpretation must be given to "state" in the Eleventh Amendment. This argument is not simply repetitious of the first, for this argument relies on the similarity of *purpose* of the Tenth and Eleventh Amendments, rather than simply on the similarity of their language. For several reasons, however, this argument is also unappealing, even assuming the Court has decided that whatever immunity from federal legislative actions the Tenth Amendment confers on states

resident of the city of Cleveland sues a resident of Shaker Heights, a suburb of Cleveland.

84. Cf. *Hunter v. Erickson*, 393 U.S. 385 (1969) (striking down as a violation of the Equal Protection Clause a charter amendment requiring voter approval of all ordinances regulating real estate transfers on the basis of race, religion, or national origin).

85. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

are also applicable to local political subdivisions.⁸⁶

First, this argument assumes that the Eleventh Amendment was enacted because of a *constitutional* misunderstanding about the relative authority of the federal government and the states. While this reading of the Eleventh Amendment seems to be the present position of at least a plurality of the Court,⁸⁷ it is by no means universally accepted.⁸⁸ More importantly, it is not clear that one can equate Tenth and Eleventh Amendment conceptions of sovereignty. Simply put, the difference between the Tenth and Eleventh Amendments is the difference between restricting Congress's Article I powers and restricting the federal judiciary's Article III powers.⁸⁹ Admittedly, both Congress and the federal judiciary can pose a threat to state autonomy, but the threats differ.

The Tenth Amendment is concerned with the locus of "substantive" decisional authority — with which *level* of government makes the rules to resolve disputes or compromise competing viewpoints or philosophies. If the essential question posed by the Tenth Amendment is whether the state or the federal government's policies will resolve a particular dispute, it simply does not make sense to interpret the word "state" in the Tenth Amendment to exclude political subdivisions. To do so would provide no *constitutional* protection to a state which, as they all do, finds it more efficient to delegate gov-

86. The Court did so explicitly in *National League of Cities v. Usery*, 426 U.S. 833, 855 n.20 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The *National League* footnote was hardly necessary, however, to reach this result. Although twenty-two states were among the appellants, only four local political subdivisions could be included in that lot. *National League*, 426 U.S. at 836-37 n.7. The Court held that the existence of the governmental appellants relieved the Court of having to determine the standing of the organizational appellants. *Id.* By the same reasoning, the fact that twenty-two of the appellants were states made the reference to local political subdivisions unnecessary. *Cf.* *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412-13 n.42 (1978) (holding that *National League* does not provide a basis for an implied constitutional deference to cities).

87. *Welsh v. State Dept. of Highways & Pub. Trans.*, 483 U.S. 468, 479-80 (1987). *See also* *Dellmuth v. Muth*, 491 U.S. 223, 229 n.2 (1989) (declining to overrule *Hans*).

88. *See supra* note 43 (citing examples of several authors who do not agree with this reading of the Eleventh Amendment). *Cf.* George D. Brown, *State Sovereignty Under the Burger Court — How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L. J. 363 (1985) [hereinafter Brown, *State Sovereignty*] (stating that the Eleventh Amendment, like the *Garcia* Court's reading of the Tenth, provides "procedural" protection from Congressional attempts to override state autonomy).

89. *TRIBE. CONSTITUTIONAL LAW. supra* note 59, at 185 (distinguishing between "substantive law making competence" — the concern of Article I and the Tenth Amendment — "and the federal judicial power" — the concern of Article III and the Eleventh Amendment). *But see* REDISH, *supra* note 43, at 150-51 (stating that the Eleventh Amendment's language also serves to limit Congress's power to establish federal courts, thus rendering *Tribe's* distinctions illogical).

erning authority to local units than to exercise all its state authority directly. Moreover, even if the word "state" in the Tenth Amendment were literally interpreted to mean only *the* state, one would still have to contend with the Amendment's last phrase, "or to the people."⁹⁰ Whatever substantive import the Tenth Amendment either does or was intended to have, it is clear from that phrase that, subject to "specific" limitations, the Constitution explicitly leaves to the states the determination of how their governing authority is to be distributed.⁹¹

The Eleventh Amendment, on the other hand, does not prevent the federal judiciary from displacing the states' policy-making authority; it only removes a federal judicial forum when the plaintiff is an individual and the defendant is a state.⁹² The Eleventh Amendment therefore protects the states from a different threat than does the Tenth Amendment: it prohibits the symbolic affront to state sovereignty which would occur if a state were forced to defend its actions in a "foreign" forum against its wishes. The Eleventh Amendment is more concerned with concepts of sovereignty than with the broader concerns of autonomy which underscore the Tenth Amendment.⁹³ Consequently, interpreting the word "state" in the Eleventh Amendment to exclude political subdivisions does not necessarily have the same effect as would a similar interpretation of the same word in the Tenth Amendment. If *Lincoln County* is to be reconsidered, then it must be for reasons other than a strict reading of constitutional text.

90. U.S. CONST. amend. X.

91. See *Bute v. Illinois*, 333 U.S. 640, 652 (1948) ("The principle of 'Home Rule' was an axiom among the authors of the Constitution.").

92. The Eleventh Amendment only prohibits the exercise of *federal* judicial authority; state courts may still be open to hear whatever claim the plaintiff may have asked the federal court to hear. Whether they may be *required* to hear such claims is not altogether clear despite *Testa v. Katt*, 330 U.S. 386 (1947) (holding that a state is not free to refuse enforcement of a *federal* law). See, e.g., *Brown, State Sovereignty*, *supra* note 88, at 391-93 (stating that whether a state court must hear all federal claims remains an open question). The distinction between who makes the policy and the forum in which that policy is applied was somewhat fuzzy before the Court decided, in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), that federal courts could no longer apply federal common law when diversity of citizenship was the only basis of federal jurisdiction. Now, however, state substantive rules of decision apply despite the federal forum. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding that the Eleventh Amendment bars a pendent state law claim even though a federal court would have to apply state law when adjudicating that claim).

93. See *infra* notes 129-216 and accompanying text (discussing the more general principles of autonomy which concern the functions local political subdivisions perform and their fiscal ability to engage in those functions).

C. *The Eleventh Amendment, Sovereignty, and The Legal Structure of Political Subdivisions*

It is fair to say that if Dillon's Rule⁹⁴ is not dead, it no longer typifies the relationship between a state and its most important political subdivisions. Well over half of the states have conferred some form of home rule authority on at least the most populous of their general purpose units of local governments.⁹⁵ In addition, most states are prohibited from enacting so-called local legislation;⁹⁶ if the state is going to legislate with respect to "local concerns," it must do so via generally applicable legislation. A few states prohibit their administrative agencies from subverting a local government's policies without some clear overriding state interest.⁹⁷ Other jurisdictions prohibit the state from taxing local residents for local purposes, reserving that authority to local governments.⁹⁸ New Jersey constitutionally abolished Dillon's Rule and substituted a rule of construction requiring broad interpretation of local governmental authority.⁹⁹ Other states accomplished the same result by judicial fiat.¹⁰⁰ In short, whereas Dillon's Rule pronounced the locus of *all* decisional authority to be at the state level, these more recent developments, to one degree or another, have shifted that decisional locus to local governments. Once the legal structure empowers local governments with "final" decisional authority with respect to local matters, they are, to that extent, "sovereign." And as sovereigns, they should be accorded the same Eleventh Amendment immunity as other sovereigns. This could be accomplished without in any way doing violence to the Court's existing Eleventh Amendment jurisprudence by simply redefining "state" in terms of the Eleventh Amendment to include all those local units of government which possess the necessary attributes of sovereignty. Indeed, it would bring Eleventh Amendment doctrine in line with the Court's original rationale in *Hans* and *Lincoln County*.

94. See *supra* note 72 and accompanying text (describing Dillon's Rule).

95. CHESTER J. ANTIEAU, LOCAL GOVERNMENT LAW § 3, at 3-3 to -6 (1992).

96. GERALD E. FRUG, LOCAL GOVERNMENT LAW 191 (1988); e.g., ALA. CONST. art. IV, § 104; MINN. CONST. art. XII, §§ 1-3; MONT. CONST. art. V, § 12.

97. E.g., COLO. CONST. art. V, § 35; PENN. CONST. art. III, § 31.

98. E.g., ILL. CONST. art. VII, § 6.

99. N.J. CONST. art. IV, § 7.

100. See *State v. Hutchinson*, 624 P.2d 1116, 1121 (Utah 1980) (holding that it is inappropriate for the court to inhibit the power of local governments through strict construction of delegated powers).

Unfortunately, the argument based on the sovereignty of local political subdivisions has significant limitations, both quantitative and qualitative. Quantitatively, both the number of jurisdictions in which political subdivisions can fairly be characterized as sovereign and the number of "sovereign" political subdivisions actually in those states are relatively few. There are a number of non-home rule states where the powers of local political subdivisions are still defined by Dillon's Rule.¹⁰¹ Political subdivisions in these states are not protected under the Eleventh Amendment because, having no claim to sovereignty, they are not state equivalents in terms of the sovereignty underpinnings of the Eleventh Amendment.

The same can be said of any political subdivision which possesses home rule powers by reason of a state *legislative* grant, whether or not that home rule grant depends on a constitutional provision.¹⁰² What the legislature gives it can take away, either in whole or in part and subject to whatever conditions it chooses to impose, so long as *other* constitutional provisions are not violated. These political subdivisions thus do not possess either criterion for a claim of law-making sovereignty. The source of their power to make "law" rests with another political body, and even when that power has been liberally granted, it is subject to limitation by the grantor. There remain those states which constitutionally confer home rule authority on their local political subdivisions without the need for discretionary legislative action (states in which the home rule provision is self-executing),¹⁰³ or where the home rule provision *requires* the legislature to confer home rule authority on local subdivisions.¹⁰⁴ But even in those states, a pure sovereignty argument requires some additional inquiries, the most prominent of which is whether the constitutional provision, despite its self-executing or mandatory nature, requires or permits the state legislature to approve a city's charter or any amendments to that charter.¹⁰⁵

Finally, even in those jurisdictions in which local political subdivisions are constitutionally granted self-governing powers without discretionary legislative oversight, the number of local units actually given that authority is likely to be relatively small. Most political

101. *E.g.*, GA. CONST. art. IX, § 2; IND. CONST. art. IV, § 10; VA. CONST. art. VII, § 2.

102. *See* MICH. CONST. art. VII, § 2 (stating that all county authority is derived through law).

103. CAL. CONST. art. XI, § 8; COLO. CONST. art. XX, § 6; OHIO CONST. art. XVIII, §§ 3, 7.

104. *E.g.*, N.Y. CONST. art. IX, § 2.

105. OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW § 36, at 99 n.8 (1982).

subdivisions are not given home rule powers; they are either delegate state agencies, such as counties or towns (often called townships in states west of the Hudson River), or single-purpose units of local government such as school boards, sanitary and water districts, housing authorities, and the like. With the exception of some limited home rule authority which some states confer on counties,¹⁰⁶ these local units are still largely governed by Dillon's Rule or its equivalent. Moreover, some states require that general purpose units of local government, excluding most villages and even some smaller cities, meet a minimum population requirement before they can exercise home rule powers.¹⁰⁷ Other states require that a city adopt a charter, the functional equivalent of a constitution for the local government.¹⁰⁸ While this seems to be of little or no hindrance to achieving sovereign status, cities which for one reason or another decide to remain statutory cities cannot claim the sovereign status which *Hans* and *Lincoln County* seem to demand.

In addition to the quantitative limit on potential Eleventh Amendment sovereignty for local political subdivisions, there is a qualitative limit as well. Not all constitutional home rule provisions establish local governmental units as being independent of the state. While a bit oversimplified, there are essentially two constitutional home rule models: the *imperio* model,¹⁰⁹ and what may be called, for want of a better description, the "Fordham" model.¹¹⁰ Both have the common feature of granting local home rule units the power to

106. E.g., OHIO CONST. art. X, § 3; PENN. CONST. art. IX, § 4. These home rule provisions typically give counties no protection from preemption either by the state or by home rule municipalities located within their borders. There are, however, rare exceptions. See FLA. CONST. art. VIII, § 6 (creating Metropolitan Dade County and giving that county preemptive powers over home rule municipalities with respect to certain county-wide matters).

107. REYNOLDS, *supra* note 105, at 98.

108. E.g., OHIO CONST. art. XVIII, § 2.

109. The *imperio* model, short for *imperium in imperio* ("state within a state"), is characteristic of some of the earlier home rule provisions such as California's, (CALIF. CONST. art. XI, § 5), Missouri's (MO. CONST. art. VI, § 19), and Ohio's (OHIO CONST. art. XVIII, § 3). Also, it is suggestive of two "sovereignties": the state and the home rule unit. The textual phrase which defines both the home rule government's scope of initiative and the limits of the state's preemptive authority is "municipal affairs," or in Ohio, the "powers of local self-government."

110. The Fordham model was drafted in 1952 by Dean Jefferson Fordham and sponsored by the American Municipal Association. This model does not limit a home rule government's initiative authority to "local or municipal affairs," or "powers of local self-government." For a general description of the Fordham model, see JEFFERSON B. FORDHAM, LOCAL GOVERNMENT LAW 77-87 (2d ed. 1986). Rather, this model generally provides that a home rule government "may exercise any power or perform any function which the legislature has power to [delegate] . . ." E.g., MASS. CONST. amend. art. 2, § 6.

initiate legislation without first seeking authority from the state legislature. The difference textually, if not in practice,¹¹¹ is that the scope of local initiative in the former is limited to matters of "local concern," while it is typical of provisions of the latter type to grant local legislative initiative over a wide spectrum of state legislative authority, subject to the unlimited preemptive power of the state. Since *Hans* and *Lincoln County* were decided at a time when the federal structure was viewed as one of dual sovereignties,¹¹² and since both have survived a shift in the Court's perception to one of a federal system of overlapping powers,¹¹³ both the Fordham model and the *imperio* model would be consistent with a sovereignty theory.

The same is true when the inquiry moves from legislative initiative to legislative autonomy, defined for sovereignty purposes as the ability to promulgate policy without having to account to the revisionary power of a higher authority. Indeed, the autonomy which local home rule governments derive from their states under both models approximates that which the states enjoy from the federal government. Like all systems premised on dual sovereignty, the *imperio* model cordons off an area of local concern immune from state legislative interference, much as the Supreme Court in *New York v.*

111. Briffault, *Part I, supra* note 16, at 15; see Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 663 (1964) ("[W]ith the possible exception of a single state, the grant of municipal initiative in home rule provisions has been broadly construed by the courts.").

112. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that the states, not the federal government, were entrusted with authority over local matters); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (stating that the act of refining sugar is local and therefore not commerce, despite the fact that the sugar was later shipped out of state). Dual federalism has judicial roots which date back to *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Although *Gibbons* was ultimately decided on Supremacy Clause grounds, Chief Justice Marshall nevertheless took the opportunity to comment that the argument based on the exclusive power of Congress to regulate commerce had "great force," and had not "been refuted." *Id.* at 209. Justice William Johnson wrote a concurring opinion which rested on a constitutional theory of mutually exclusive powers. *Id.* at 222-39 (Johnson, J., concurring).

113. A "clean break" with the concept of dual federalism occurred in *United States v. Darby*, 312 U.S. 100 (1941), when the Court described the Tenth Amendment, which to the *Hammer* Court was the textual embodiment of dual federalism, as a "truism." *Id.* at 124. That our constitutional structure contemplates overlapping rather than exclusive powers is also evident in the so-called "dormant Commerce Clause" cases. These cases recognize that states have the authority to regulate matters which, because of their close connection to interstate commerce, Congress could also regulate if it chose to do so. See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (upholding a state regulation prohibiting oil refiners from owning retail gasoline outlets despite the fact that the interstate effects would undoubtedly justify federal regulation); *South Carolina St. Hwy. Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938) (upholding a state regulation limiting the size of trucks on state highways).

*United States*¹¹⁴ cordoned off an area of state concern immune from federal interference under the Tenth Amendment. It is true that under the Fordham model, a state legislature has the power to preempt local legislative decisions of any nature as well as the ability to prohibit the exercise of local authority in any area it wishes.¹¹⁵ However, when one looks to state autonomy in the federal system for guidance, the distinction between the two models may be more apparent than real. The judicial standards for determining when preemption occurs, an issue decided far more frequently than the constitutional issue of legislative power, are nearly identical. Both at the federal/state level and at the state/local level, preemption is not lightly presumed. Only if the two enactments cannot coexist will a court declare that one has been displaced by the other.¹¹⁶ At both the federal and state levels, this approach is informed, if not demanded, by similar principles of federalism.¹¹⁷

There are two wrinkles, however. First, under neither home rule model is it permissible for a local political subdivision to enact "private law." Despite the unlimited textual delegation in the "Fordham" model, it has never been interpreted to include the power to promulgate the basic rules of contract, tort, or property. The result is the same in *imperio* model jurisdictions; private law is not considered a matter of "local concern."¹¹⁸ How then can a local home rule unit claim it is "sovereign" if it has no authority, absent state authorization, to determine the basic civil rules of behavior? It is

114. 112 S. Ct. 2408 (1992) (striking down the "take-title" provision of the Low-Level Radioactive Waste Policy Amendment Act as an infringement of state sovereignty under the Tenth Amendment); see also *National League of Cities v. Usery*, 426 U.S. at 833, 845, 851 (1976) (holding that Congress may not regulate in a manner that impinges on the states' decision-making authority over its governmental functions), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

115. Frank P. Grad, *The State's Capacity to Respond to Urban Problems*, in *THE STATES AND THE URBAN CRISIS* 49 (Alan K. Campbell ed., 1970), cited in WILLIAM D. VALENTE & DAVID J. MCCARTHY, JR., *LOCAL GOVERNMENT LAW* 112 (4th ed. 1992).

116. See *Evanston v. Create, Inc.*, 421 N.E.2d 196 (Ill. 1981) (refusing to find that a city landlord was preempted by state law); *Massie v. Brown*, 527 P.2d 476 (Wash. 1974) (holding that a municipality may be enjoined from extending civil service status to warrant servers when the state asserts a paramount interest).

117. See *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991) (refusing to upset the balance between federal and state powers absent an express congressional mandate); *United States v. Bass*, 404 U.S. 336 (1971) (stating that American federalism gives rise to Congress's reluctance to disturb federal and state relations); *State ex rel Haley v. Troutdale*, 576 P.2d 1238 (Ore. 1978) (holding that more stringent local building codes were not incompatible with state standards).

118. See generally Gary T. Schwartz, *The Logic of Home Rule and The Private Law Exception*, 20 U.C.L.A. L. REV. 671 (1973) (exploring the authority of a "home rule" city to establish "private law").

tempting to respond that "it cannot." However, if one looks to the reasons why this is so, the analogy to state powers under the federal system is not far off. The spill-over effects of differing standards of commercial and noncommercial intercourse between upwards of thirty to fifty jurisdictions within closely-confined territorial limits would be enormous, to say the least;¹¹⁹ too enormous to reasonably expect a state legislature to be able to cure these effects with its preemptive authority. That is essentially the same reasoning the Court used to assert the "need for uniformity" standard in *Cooley v. Board of Wardens*,¹²⁰ a standard which is now used to determine whether congressional commercial legislation "intended" to preclude any state regulation.¹²¹ While *Cooley* imposed a more discrete limitation on state lawmaking sovereignty than the total exclusion of local governments from the arena of private lawmaking authority, when looking for analogies, it is the rationale of the exclusion that is determinative.

The second wrinkle is not so easy to dispose of because it arguably goes to the heart of the Eleventh Amendment's concern. What precipitated the *Chisholm*¹²² "crisis," and what has preoccupied Eleventh Amendment litigation ever since, is a concern for the integrity of the state's fisc. Indeed, that concern is far broader than the Eleventh Amendment; it is a concern which both historically and currently pervades our discussion of local autonomy and self-governance.¹²³ Next to a state's power to determine its own governmental structure and methods of conducting its governmental business, a state's power to raise revenue to finance that business is *the* prerogative protected by our dual system of government. At the same time Chief Justice Marshall articulated a broad preemptive federal power over state regulatory choices under the Necessary and Proper Clause, he carefully circumscribed federal power when it

119. *Id.* at 748-50, 759.

120. 53 U.S. 299 (1851).

121. *E.g.*, *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973) (discussing the disruptive effect of multiple noise control regulations).

122. See *supra* notes 49-71 and accompanying text (comparing the decisions in *Chisholm* and *Hans*).

123. See *Brown, State Sovereignty*, *supra* note 88, at 373, 391 (discussing the importance of state authority over its own treasury); Tribe, *New Federalism*, *supra* note 13, at 1075-76 (suggesting that federal control over state budgets could significantly curtail local services). See generally Frug, *Power of the Purse*, *supra* note 16 (suggesting that the Supreme Court will have to place limits on the ever-increasing influence that local governments have over governmental spending).

came to a state's revenue raising authority.¹²⁴ While he was willing to concede the possibility that Congress's commerce powers were exclusive, he was careful to say that Congress's taxing powers were not.¹²⁵

Unlike the federal/state system, which presupposes significant state fiscal autonomy, all home rule provisions leave the state substantially in control of local finances and local financing options. There are two approaches to taxing authority under home rule provisions (including *imperio* home rule provisions). The most restrictive prohibits even local initiative on taxing options. Absent a special constitutional provision, local political subdivisions in these jurisdictions must seek state legislative approval to tax their citizens.¹²⁶ Further, even those jurisdictions which interpret their home rule provisions to allow local legislative initiative in fiscal matters liberally permit state preemption of local taxing decisions.¹²⁷ Moreover, most jurisdictions, whatever their position on local tax initiatives, require state oversight of local budgets, whether to ensure that debt limits are respected or that tax rates do not exceed prescribed limits.¹²⁸ Simply put, while home rule provisions may have altered Dillon's Rule assumptions about the locus of local regulatory authority, they have altered very little, if at all, any assumptions regarding the locus of fiscal authority. Consequently, any analogy between a state's general autonomy from federal authority by reason of our constitutional structure and a local government's autonomy from state authority by reason of a home rule provision breaks down almost completely when one focuses on the central concern of the Eleventh Amendment: fiscal autonomy. Other reasons, unrelated to sovereignty, must then justify Eleventh Amendment immunity for local political subdivisions.

III. ARGUMENTS FROM FUNCTION

A. *The Functions Performed by Political Subdivisions*

There was a time when it was easy to functionally distinguish be-

124. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425-30 (1819).

125. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190-200 (1824).

126. FRANK I. MICHELMAN & TERRANCE SANDALOW, *MATERIALS ON GOVERNMENT IN URBAN AREAS* 422-47 (1970); REYNOLDS, *supra* note 105, § 40, at 110-12; Frug, *The City*, *supra* note 71, at 1057, 1064.

127. REYNOLDS, *supra* note 105, § 40, at 110-12.

128. E.g., OHIO REV. CODE ANN. § 705.15 (Baldwin 1990).

tween a state and its local governments, particularly cities — which have the most plausible claim for Eleventh Amendment protection. The state was responsible for most governance functions as we now know them, including the raising of whatever revenue was needed through mandatory exactions. Local subdivisions possessed few powers of governance except those that were incident to the management of their own properties. Most municipal services were either individually purchased or provided cooperatively,¹²⁹ much like a present-day homeowner's association.¹³⁰

That is certainly not true today. If one looks at the functions of the modern city, they are hardly different from those of the state. Actually, it is more than that. As Professor Richard Briffault demonstrates, in a number of important areas local governmental units have largely displaced the state as the primary governing and service-providing unit.¹³¹ Cities and other general purpose political subdivisions legislate in a wide area of their citizens' economic and social activities, from traffic regulation to weights and measures requirements for merchants, from comprehensive criminal codes to land use regulations and property management codes, and everything in between. They enforce their will with their own police forces, often in their own courts. Moreover, many of these political units have assumed responsibility for some of the most pressing social service needs of the day. Some cities own and manage hospitals, run drug control programs, and provide housing for low income persons, while paying for many of these services by redistributive taxes assessed on residents and nonresidents alike. Even those entities that do not possess the comprehensive powers of the urban city perform a variety of functions which the state either had performed or would be performing were it not for these local political entities.¹³²

129. HARTOG, *supra* note 66, at 36 ("When government activity was needed, . . . [citizens] looked not to the corporation but to statutory authorities established by the provincial legislature to take charge of the vital affairs of the community. Or they looked to voluntary associations such as fire companies and libraries.").

130. See generally Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982) (describing the role of homeowners' associations and their possible inclusion in public governance); Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976) (analyzing homeowners' associations as residential private governments).

131. Briffault, *Part II*, *supra* note 16, at 354, 382.

132. The most notable example is education. Most state constitutions require the state to perform educational functions, but most have delegated this function to local political subdivisions: either general purpose units like cities or independently-elected school boards. *E.g.*, N.Y. CONST. art. XI; PA. CONST. art. III, § 14; TEXAS CONST. art. VII, § 1.

Why then should Eleventh Amendment immunity focus on archaic definitions of sovereignty and outmoded understandings of local governmental functions? If these local political subdivisions are doing the states' business, why should they not receive the states' Eleventh Amendment immunities? The argument that they should receive immunity is particularly appealing if one views the Eleventh Amendment in the larger context of preserving federalism/local autonomy values, rather than simply as an isolated attempt to constitutionalize common law sovereign immunity.¹³³ Unfortunately, this position would necessitate a fairly detailed, case-by-case functional analysis, and such *ad hoc* functional analysis has not fared well under either the Tenth or Eleventh Amendments. *Garcia v. San Antonio Metropolitan Transit Authority*¹³⁴ rejected the functional analysis of *National League*¹³⁵ as both unworkable and inconsistent with federalism values.¹³⁶ While *New York v. United States*¹³⁷ may have employed a functional analysis, it seems limited to prohibiting the federal government from *conscripting* states into a federal regulatory army.¹³⁸

Functional analyses have had little staying power under the Eleventh Amendment as well, although the Court has toyed more explic-

133. See Brown, *State Sovereignty*, *supra* note 88, at 363 (suggesting that viewing the Eleventh Amendment as "an embodiment of state sovereignty principles" is the best way to justify the case law the amendment has generated) (emphasis added); Melvyn R. Durchslag, *Welfare Litigation, the Eleventh Amendment and State Sovereignty: Some Reflections on Dandridge v. Williams*, 26 CASE W. RES. L. REV. 60, 62-75 (discussing the history of the Eleventh Amendment and its policies of preserving state sovereignty and maintaining the federal system); Massey, *supra* note 43 (discussing conflicting interpretations of the Eleventh Amendment).

134. 469 U.S. 528 (1985).

135. *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia*, 469 U.S. 528 (1985).

136. *Garcia*, 469 U.S. at 531; TRIBE, *CONSTITUTIONAL LAW*, *supra* note 59, § 5-22, at 390-97. It is hard to generalize about the utility of functional analyses to constitutional adjudication. For example, such an analysis was critical to some determinations of whether a private person could be treated as the state for purposes of the Fourteenth Amendment. See *Evans v. Newton*, 382 U.S. 296 (1966) (private park); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company-owned towns); *Smith v. Allwright*, 321 U.S. 649 (1944) (political party). *But cf.* *Hudgens v. NLRB*, 424 U.S. 507 (1976) (overruling the decision in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968), but apparently not the public function reasoning which underlay the *Amalgamated* decision). Moreover, functional analysis *ala National League* seemed to be employed by the Court in *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400 (1991), to determine whether mandatory retirement for state judges was permissible under the Federal Age Discrimination in Employment Act.

137. 112 S. Ct. 2408 (1992).

138. *Id.* at 2430-31; *F.E.R.C. v. Mississippi*, 456 U.S. 742, 775-97 (1982) (O'Connor, J., concurring in part and dissenting in part).

itly with the idea. In *Parden v. Terminal Railway*,¹³⁹ the Court held that the state of Alabama could be sued under the Federal Employers Liability Act ("FELA")¹⁴⁰ for injuries sustained by a worker employed by a state-owned railroad. The Court reasoned that (1) because the state had engaged in an activity (operating a railroad) generally engaged in by private persons, and (2) because that activity was pervasively regulated by Congress under its commerce powers, the state constructively consented to being treated similar to other private persons with respect to FELA.¹⁴¹ Some nine years later, in *Employees v. Department of Public Health and Welfare*,¹⁴² the Court employed the *Parden* reasoning when it suggested that the latter case was distinguishable because of the "proprietary" nature of operating a railroad. However, one year later, in *Edelman v. Jordan*,¹⁴³ the Court began to abandon the functional approach for determining waiver of sovereign immunity in favor of the more certain "congressional clear statement" rule.¹⁴⁴ *Parden* was finally expressly overruled seven years ago in *Welch v. Texas Department of Highways and Public Transportation*.¹⁴⁵

Admittedly, the Court has paid lip service to function as being one element in determining whether certain "out of the ordinary" governmental bodies are political subdivisions or arms of the state.¹⁴⁶ However, this limited use of a functional analysis is a far cry from its more general use as the *determinative* test of local governmental immunity. At the very least, a functional analysis inevitably entails the kind of judicial balancing that the Court made a con-

139. 377 U.S. 184 (1964), *overruled by* *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987).

140. 45 U.S.C. §§ 51-60 (1988 & Supp. II 1990).

141. *Parden*, 377 U.S. at 187-93.

142. 411 U.S. 279, 284 (1973).

143. 415 U.S. 651 (1974) (holding that a state's participation in a federally-subsidized welfare benefits program was not dispositive of that state's consent to be sued in federal court).

144. *Id.* at 674. The "clear statement" rule was reasserted with unmistakable vigor in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), when the Court held that the remedy provided in Section 504 of the Rehabilitation Act, 29 U.S.C. § 794a (a)(2) (1988), was insufficient to waive a state's Eleventh Amendment immunity. *Atascadero*, 473 U.S. at 246-47. The language of the remedy applied "to any person aggrieved by any act . . . by any recipient of Federal assistance." 29 U.S.C. § 794a(a)(2) (1988). The Eleventh Amendment "clear statement" rule may now be a general requirement whenever Congress legislates with respect to areas which are traditionally regulated by the states. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991).

145. 483 U.S. 468 (1987) (holding that an employee of the state could not sue the state in federal court under the Jones Act).

146. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401-03 (1979).

scious effort to avoid in cases such as *Welsh*, *Atascadero*, *Garcia*, and *New York*.¹⁴⁷ At its worst, a functional analysis will produce the same confused and irreconcilable set of cases that now exists when courts try to determine whether or not a particular governmental unit, one which is not a city, is an arm of the state.¹⁴⁸

To avoid that confusion, every state-created entity which possesses "public" powers must be entitled to Eleventh Amendment sovereign immunity. If the desired result is assurance that state services will be unhampered by federal court judgments, then presumably whatever structure the state creates — or enables its local governments to create — to administer public services ought to be entitled to Eleventh Amendment immunity. That result may be more acceptable when the beneficiary is an "ordinary" local political subdivision such as a city, town, or school board. These are at least political bodies which have all of the trappings (and built in political constraints) of "the state." But what about a water storage district which, because of its essentially private membership characteristics, was held not to be "political" and thus not subject to the Fourteenth Amendment's "one-person, one-vote" requirement?¹⁴⁹ Is such an organization whose major, if not only, public characteristic is its public bonding capacity also entitled to Eleventh Amendment immunity simply because the state created it in order to promote a public purpose?¹⁵⁰ If a state permits the formation of private, not-for-profit organizations to undertake certain state functions such as

147. But see Stewart A. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 175 (1977) (explicitly arguing for a "balancing test" to determine the scope of state immunity under the Eleventh Amendment and asserting that the strength of a state's interest be measured largely by a governmental/proprietary distinction). Baker's article was written before *Garcia* and *Welsh* were handed down, however.

148. See ORTH. JUDICIAL POWER, *supra* note 21, at 118-20.

149. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); *Ball v. James*, 451 U.S. 355 (1981). See generally Melvyn R. Durchslag, *Salyer, Ball and Holt: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE W. RES. L. REV. 1 (1982) [hereinafter *Durchslag, Reappraising the Right*] (criticizing the Court's analyses in *Salyer*, *Ball*, and *Holt* and focussing on "interest" as the determinative criterion).

150. It is "hornbook law" that public funds can only be expended for public purposes. REYNOLDS, *supra* note 105, §100, at 304-05. There has been some dispute about whether direct assistance to private businesses in the form of tax abatements or low-interest financing through publicly issued bonds (general obligation or revenue) is a public purpose. *Compare* *Common Cause v. State*, 455 A.2d 1 (Me. 1983) (holding that the use of state money to rehabilitate a dock which was to be leased to a private company was within the legislature's power) *with* *Mitchell v. North Carolina Financing Auth.*, 159 S.E. 2d 745 (1968) (holding that a state cannot issue bonds to encourage economic development if private persons would stand to benefit). As a general matter, there is little dispute that the economic well-being of the citizenry is an appropriate state concern; the question is means, not ends.

land clearance and urban redevelopment,¹⁵¹ should those private corporations be entitled to Eleventh Amendment immunity simply because they are performing functions which might be considered "state" functions? It is not my purpose to answer these questions. Suffice it to say that in order to accept the argument in its full scope, one must be prepared to blur the distinction between the public and private spheres, certainly for Eleventh Amendment purposes if not for other aspects of constitutional jurisprudence as well.¹⁵²

B. *Protecting the Means of Governance — The Public Fisc*

Arguably, both the Eleventh Amendment and common law doctrines of sovereign immunity are primarily concerned with protecting the public treasury from judicially-mandated transfer payments. The major Eleventh Amendment cases, from *United States v. Peters*¹⁵³ in 1809 to *Port Authority Trans-Hudson Corporation v. Feeney*¹⁵⁴ in 1990, have involved suits in which monies have been claimed from a state or political subdivision's treasury. As early as 1821, in *Cohens v. Virginia*,¹⁵⁵ Chief Justice Marshall commented that the purpose of the Eleventh Amendment was not to generally protect the states from the affront of having to defend a claim in a "foreign" court, but to protect the state from having to defend claims asserted by "persons who might probably be its creditors."¹⁵⁶ More recently, in *Quern v. Jordan*,¹⁵⁷ the Court, in articulating the requirement that Congress be explicit if it intends to waive a state's Eleventh Amendment immunity, hinted that the degree of explicitness might depend on the potential fiscal impact of Congress's action.¹⁵⁸ Protecting the public fisc is also the major reason for the common law doctrine of sovereign immunity.¹⁵⁹

151. See, e.g., New York Private Housing Fin. Law §§ 570-82 (McKinney 1976) (establishing the Housing Development Fund Companies); OHIO REV. CODE §§ 1728.01 - .13 (Baldwin 1986) (establishing nonprofit community urban redevelopment corporations).

152. This theory has been advocated by several scholars. E.g., Frug, *The City*, *supra* note 71, at 1128-41; Carol Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 98 (1989).

153. 9 U.S. (5 Cranch) 115 (1809).

154. 495 U.S. 299 (1990).

155. 19 U.S. (6 Wheat.) 264 (1821).

156. *Id.* at 406.

157. 440 U.S. 332 (1979).

158. *Id.* at 344-45 n.16.

159. 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 29.3, at 603 (2d ed. 1986). See generally Louis L. Jaffee, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963) (analyzing the damage action as a method of providing relief against governmen-

Despite this, *Lincoln County* distinguishes between public monies in the hands of the state, which are immune from private attachment, and public monies in the hands of a local entity the state has created to do its bidding, which are not immune from private attachment. Arguably, this makes little sense since a dollar of public money "lost" to a private creditor is lost in the same way and with the same impact, irrespective of the account in which it is resting.

However, it is hard — either historically or currently — to view the Eleventh Amendment only in fiscal terms. Certainly Pennsylvania's fisc was placed in jeopardy by the result in *United States v. Peters*.¹⁶⁰ Just as certainly, the state's fisc was not helped by the prospective/retrospective relief distinction drawn by the Court in *Milliken v. Bradley*,¹⁶¹ when it required the state of Michigan to pay for certain compensatory education programs. Indeed, Professor Gerald Frug's comment that the prospective/retrospective distinction has nothing to do with a state's fiscal integrity¹⁶² is precisely the point: sovereignty itself is more significant to Eleventh Amendment analysis than the fiscal argument can admit.¹⁶³ Once sovereignty is injected into the Eleventh Amendment, the distinction between a state and a local political subdivision becomes not only understandable, but maybe defensible as well.¹⁶⁴

Even if admittedly arcane concepts of sovereignty are excised from the Eleventh Amendment discussion in favor of some broader concept of autonomy,¹⁶⁵ it is not clear that this would lead to Elev-

tal misconduct and outlining several factors for determining the sovereign immunity of state officers).

160. 9 U.S. (5 Cranch) 115, 138-39 (1809) (upholding federal jurisdiction when a private claimant sought to compel a state officer to pay him damages from a state fund held in the private estate of the deceased state treasurer).

161. 433 U.S. 267, 288-89 (1977).

162. FRUG, *The Power of the Purse*, *supra* note 16, at 752-53.

163. See *Pennsylvania v. Union Gas Co.* 491 U.S. 1, 37 (1989) (Scalia, J., concurring in part and dissenting in part) (stating that "*Hans* was . . . enunciating a fundamental principle of federalism, evidenced by the Eleventh Amendment, that the States retained their *sovereign prerogative* of immunity") (emphasis added).

164. *Stare decisis* may make it difficult for a court to cut the Eleventh Amendment loose from its sovereignty moorings. See Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260 (1990) (asserting that overruling *Hans* would not violate *stare decisis* because *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), so undermines the rationale of *Hans* that its continuing vitality is no longer justified).

165. Rapaczynski, *From Sovereignty to Process*, *supra* note 62, at 402. Even then, one must be careful to distinguish between fiscal autonomy from federal legislative interferences and fiscal autonomy from federal judicial interferences. *TRIBE. CONSTITUTIONAL LAW*, *supra* note 59, §§ 3-26, at 185. The state's fisc is not immune even from direct exactions imposed by Congress. See, e.g., *Massachusetts v. United States*, 435 U.S. 444 (1978) (upholding a federal registration tax on

enth Amendment protection of the *local* government's treasury. Judicial precedent supporting local, as distinct from state, autonomy is hard to come by. Professor Briffault mentions a number of cases which he asserts make the argument for the Court's recognition of "localism" as a distinct constitutional value.¹⁶⁶ Cases such as *Avery v. Midland County*,¹⁶⁷ *Milliken v. Bradley*,¹⁶⁸ *San Antonio Independent School District v. Rodriguez*,¹⁶⁹ *Town of Hallie v. City of Eau Claire*,¹⁷⁰ and *City of Eastlake v. Forest City Enterprises, Inc.*,¹⁷¹ arguably establish the Court's willingness to give some Constitutional imprimatur to local governmental units. To this list I would add *Rizzo v. Goode*,¹⁷² which held that federalism concerns limited the Court's ability to remedy abusive police practices by the city of Philadelphia.¹⁷³

Since I do not find that most of these cases are terribly persuasive in establishing a general constitutional commitment to "localism," I am hesitant to conclude that they provide sufficient reasons for reconsidering *Lincoln County*, even on broadly-based local autonomy grounds. *Avery*, for example, had far less to do with localism than it did with a principle of equality,¹⁷⁴ which says that persons equally interested in a political body must have equal participatory rights in that body. It is true that the result is "local," but its focus is not. Rather, both *Avery* and its progeny focus less on the local governmental unit than on the powers which *the state* has given that government.¹⁷⁵ Even *Rodriguez*, which seemingly placed a high consti-

aircraft owned by a state and used by state police); *New York v. United States*, 326 U.S. 572 (1946) (holding that profits earned by a state from selling mineral waters were taxable in the same way as profits earned by private persons). *A fortiori*, Congress can impose indirect burdens on a state's treasury. *E.g.*, *New York v. United States*, 112 S. Ct. 2408 (1992); *South Carolina v. Baker*, 485 U.S. 505 (1988). *Cf.* *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that Congress can require the states to choose between complying with federal policy or refusing federal grant funds).

166. Briffault, *Part I, supra* note 16, at 86-115 (arguing that these and other cases are inconsistent with the "stateist" position of *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907)). Professor Briffault does not force the argument to the Eleventh Amendment; that is solely my doing.

167. 390 U.S. 474 (1968).

168. 418 U.S. 717 (1974).

169. 411 U.S. 1 (1973).

170. 471 U.S. 34 (1985).

171. 426 U.S. 668 (1976).

172. 423 U.S. 362 (1976). Even this list is not exhaustive. *See* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. LAW & ECON. 23, 36-37 n.31 (1983) (citing additional cases evidencing federal judicial concern for local governmental autonomy).

173. *Rizzo*, 423 U.S. at 379-80.

174. *Avery v. Midland County*, 390 U.S. 474, 476-77, 482-86 (1968).

175. *Id.* at 482.

tutional value on local funding of local school districts, in reality did nothing more than validate *the state's* choice to provide a local funding mechanism in order to preserve the state's choice for local control.¹⁷⁶ A state's decision to centralize funding would be equally impervious to fourteenth amendment scrutiny. And in *Milliken*, a Fourteenth Amendment "remedies" case, the Court did not so much recognize the sanctity of local school boundaries as it recognized the sanctity of *state drawn* school district lines.¹⁷⁷ Likewise, the Court's concern in the zoning cases cited by Professor Briffault was the scope of various individual rights — property,¹⁷⁸ associational,¹⁷⁹ and equality.¹⁸⁰ Any validation of local legislative authority which might have resulted from those holdings had to do with the burden of overcoming governmental regulation, not with the level of the regulating government. As indicated in Part I, no one doubts that local governmental units are "states" for purposes of the Fourteenth Amendment. These cases, then, are consistent with Eleventh Amendment doctrine which recognizes the state, not its local subdivisions, as the constitutionally protected governing unit.

It is true that in *Town of Hallie*, the Court seemed to modify the required identity between the state and its local political subdivisions in order for the latter to claim antitrust immunity under *Parker v. Brown*,¹⁸¹ apparently giving local governments some independent discretion to engage in anti-competitive behavior.¹⁸² It is

176. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 48-53 (1973) (holding that the decentralization of funding is a state policy).

177. *Milliken v. Bradley*, 418 U.S. 717, 742-44 (1974) (stating that local control of schools is a state decision).

178. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976).

179. *Village of Belle Terre v. Borsas*, 416 U.S. 1 (1974).

180. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *James v. Valtierra*, 402 U.S. 137 (1971).

181. 317 U.S. 341 (1943) (upholding a state requirement that raisin growers place most of their crop under an industry committee's marketing control even though 95 percent of the crop was usually sold out-of-state).

182. The question in *Hallie* was whether the town, which provided sewage treatment to a two-county area, could "tie" that service to sewage collection and transportation without violating the antitrust laws. The Court held that a general delegation of authority from a state to its local political subdivisions is sufficient to constitute state permission to engage in uncompetitive behavior if that behavior could reasonably be expected to result from the delegated authority. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985). See also *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991) (upholding the *Parker* exemption for a local billboard regulation under general zoning authority from the state.) In addition, the *Hallie* Court held that a state's immunity will attach even if the state does not engage in active supervision of the local government's anti-competitive activity. *Hallie*, 471 U.S. at 46. It is true that the distinction between states and local governments for purposes of antitrust liability is informed by Eleventh

still unclear, however, the extent to which one can generalize from an implicit statutory immunity (that even under *Town of Hallie* remains state immunity, not local immunity) to a general constitutional equation of states with local governments for purposes of the Eleventh Amendment.

Rizzo is somewhat more compelling. Both implicitly and in its specific language,¹⁸³ the Court equated the governmental apparatus of a local government with that of a state. Moreover, like the Eleventh Amendment, the principle of federalism recognized in *Rizzo* constrains the judiciary.¹⁸⁴ While *Rizzo* had far more to do with governmental structures and processes than with fiscal concerns, the importance of the former to our dual system of government is certainly equal to that of the latter.¹⁸⁵ The major weakness in the analogy is that the *Rizzo* Court may have been less concerned with preserving local prerogatives than with its own lack of expertise in supervising day-to-day administrative functions, at whatever level of government those functions might be performed. Indeed, the general language, analysis, and result in *Rizzo* can also be found in cases involving state institutions such as prisons¹⁸⁶ and, under the guise of separation of powers, federal institutions such as the military.¹⁸⁷ Thus, the Court in *Rizzo* may have been more concerned with questions regarding the role of the judiciary than with questions of local autonomy, fisc or otherwise.

Although it would be difficult for local political subdivisions to

Amendment doctrine. *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52-54 (1982). It is nevertheless "common law adjudication under the Sherman Act." Easterbrook, *supra* note 172, at 36. Consequently, it is hard to assume that state immunity from the antitrust laws will work to inform Eleventh Amendment doctrine. It may be even more difficult to assume that the Court might use *Hallie* as a theoretical basis for reconsidering *Lincoln County*.

183. *Rizzo v. Goode*, 423 U.S. 362, 380 (1976) (stating that "[federalism] is sought . . . against . . . an executive branch . . . of state or local governments").

184. In some respects, the *Rizzo* Court's decision to refrain from supervising the Philadelphia police department resembles similar judicial hesitancy in deference to state decision-makers. For example, federal courts will abstain when there are unanswered questions of state law which will dispose of the federal claim (the so-called *Pullman* abstention), when state regulatory schemes might be disrupted by federal judicial intervention (the so-called *Buford* abstention), and when there is an on-going state judicial proceeding which is adequate to the task (the so-called *Younger* abstention). There is no indication that the Court in any way distinguishes between state and local proceedings in determining whether to abstain under any of these doctrines. See, e.g., *Harris County Comm'rs Court v. Moore*, 420 U.S. 77 (1975) (discussing the *Pullman* abstention doctrine).

185. E.g., *New York v. United States*, 112 S. Ct. 2408, 2429-35 (1992); *FERC v. Mississippi*, 456 U.S. 742, 771-79 (1982) (O'Connor, J., concurring in part and dissenting in part).

186. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

187. *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986).

acquire Eleventh Amendment sovereign immunity "on their own," it may be possible to argue that they should ride the coattails of the states' sovereign immunity. Professor Frug, for example, argues that since state subventions make up a substantial portion of local political subdivision revenues, any judgment rendered against a political subdivision has a "corresponding impact on the state."¹⁸⁸ A related argument asserts that certain functions of local political subdivisions are so essential to the citizens as *citizens of the state* that if the local unit were to default, the state would either be "obligated" to step in and provide the service directly or, if the state could catch the default early enough, force the local unit to readjust its budgetary priorities.¹⁸⁹

The case is easiest to make if the state constitution mandates that a particular service be provided, such as a "fair and efficient" education.¹⁹⁰ But even absent such a specific clause, a state can hardly stand by while a local governmental unit decides to sacrifice municipal police and fire protection in favor of a municipal baseball stadium. The point is that with respect to these services, the monies which the local government spends are only proxies for the monies which the state would otherwise have to spend. The problem with both of these arguments is that they, like the arguments discussed in the previous sections, rely on an identity between the state and its local political subdivisions. Put another way, these arguments implicitly accept the current state of Eleventh Amendment law, including all of its sovereignty baggage, with the exception, of course, of *Lincoln County*.

Professor Frug's argument that state subventions create an identity of local money with that of the state is inconsistent with other areas of constitutional doctrine. For example, when the United States enters into a cost-plus agreement with a defense contractor,

188. Frug, *Power of the Purse*, *supra* note 16, at 756 n.217. See also *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123-24 n.34 (1984) (raising the spectra of Eleventh Amendment immunity for state-funded, locally-administered programs on the theory that a judgment "runs against the state"). The *Pennhurst* Court did not decide the immunity of local officials on that basis, however; the Court preferred to rest its decision on the incompleteness of any relief against only county employees and the degree of cooperation required between state and county officials. *Id.* at 123-24. In short, the Court seemed to consider state and county officials to be partners in operating the *state's* mental health facilities.

189. *Cf.* Michelman, *supra* note 13 (arguing that sovereignty can also be understood as a service role implying duties and obligations); Tribe, *New Federalism*, *supra* note 13 (claiming that *National League* offers support for asserting personal rights to basic local services).

190. *E.g.*, N.J. CONST. art. VIII, § IV (1); PA. CONST. art. III, § 14.

that contractor cannot "piggy-back" on the federal government's claim of immunity from state taxation simply because the federal government is obligated to pay that tax bill.¹⁹¹ Moreover, the fact that the state may contribute significantly to a non-state entity does not convert the latter into a state entity for purposes of the Fourteenth Amendment.¹⁹² Admittedly, these are examples of public subsidies to what are undeniably otherwise private entities, whereas *Lincoln County* deals with public entities. Unfortunately, the *Lincoln County* Court recognized no difference between private entities and local political subdivisions for purposes of the Eleventh Amendment.¹⁹³ Although that view of local political subdivisions may be wrong, it is not for reasons of a state subsidy. More to the point, in one of the earliest Eleventh Amendment cases, *United States v. Peters*,¹⁹⁴ the Court upheld federal jurisdiction when a private claimant sought to compel a state officer to pay him damages from a fund rightfully owned by the state. When the state asserted that the Eleventh Amendment barred the federal court's jurisdiction, the Court answered that because that money was held in the private estate of the late treasurer of Pennsylvania, the Eleventh Amendment did not apply.¹⁹⁵ The fact that the state was the equitable owner of that fund was not sufficient to invoke the Eleventh Amendment.¹⁹⁶ That ruling clearly covers the first argument, regarding state subventions to local governmental units, and is probably broad enough to encompass the second as well.

Moreover, the second argument, which posits that the state will have to make up any shortfall in certain services, is nothing more than the functional argument with a fiscal cast. Like the functional argument, the line which divides those functions for which the state

191. *Alabama v. King & Boozer*, 314 U.S. 1 (1941); see also *United States v. Detroit*, 355 U.S. 466 (1958) (holding that a private party is not exempt from state property tax by reason of a federal reimbursement agreement).

192. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982) (holding that the State of New York's subsidization, funding, and licensing of a nursing home does not make the actions and decisions of that home those of the state); *Ascherman v. Presbyterian Hosp. of Pac. Med. Ctr., Inc.*, 507 F.2d 1103 (9th Cir. 1974) (holding that a hospital's receipt of federal funds was not sufficient to turn actions of a private hospital into those of the state). Cf. *Rendel-Baker v. Kohn*, 457 U.S. 830 (1982) (stating that the receipt of government funding does not mean a private actor is operating "under color of state law" for purposes of § 1983).

193. See *supra* notes 66-76 and accompanying text (explaining why local political subdivisions are not equally sovereign and entitled to sovereign immunity under the Eleventh Amendment).

194. 9 U.S. (5 Cranch) 115, 139 (1809).

195. *Id.* at 138.

196. *Id.* at 139-40.

itself is ultimately responsible from those for which it is not is too fuzzy to serve as a constitutional boundary. To be repetitive, the Court has rejected what amounts to a governmental/proprietary distinction as being helpful to understanding the boundaries of both the Eleventh Amendment and the broader principles of structural federalism embodied in the Tenth Amendment.

The "riding the coattails of state sovereign immunity" argument can also be asserted in broader federalism terms as federal interference with a state's decision to delegate governance responsibilities to local subdivisions. Put doctrinally, *Lincoln County* cannot be reconciled with the principle of federal constitutional neutrality implicit in *Hunter v. City of Pittsburgh*¹⁹⁷ and its recent progeny.¹⁹⁸ *Hunter* involved a Pennsylvania statute which permitted one city to annex another with the approval of a simple majority of those in both cities. The plaintiffs, who were residents of the city of Allegheny, sought to have the statute declared unconstitutional as a violation of the due process clause of the Fourteenth Amendment.¹⁹⁹ The Court denied the plaintiffs' claim, deciding that the federal Constitution has nothing to say about the manner in which a state distributes political authority within its boundaries.²⁰⁰ *Hunter* requires federal neutrality with respect to structural or institutional issues between a state and its local governing units.²⁰¹ Put another way, *Hunter* in-

197. 207 U.S. 161 (1907).

198. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (upholding the city's police jurisdiction statute and ruling that a governmental unit may legitimately restrict the right to participate in its political processes to individuals who reside within the city limits).

199. *Hunter*, 207 U.S. at 171-72.

200. *Id.* at 178-79; see also *Holt Civic Club*, 439 U.S. at 73-75 (stating that the Court does not sit to determine whether a legislature chose the soundest and most practical form of internal government possible).

201. The claim for neutrality required by *Hunter* is somewhat overstated. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1964), the Court struck down Alabama's redrawing of Tuskegee's boundaries in order to exclude blacks from voting, arguably demonstrating that citizens do have some federal constitutional claim to local representation. However, the claim in *Gomillion* was discrimination — that blacks and whites were treated differently simply because of their skin color. *Id.* at 340-42. In that sense the case was no different from one in which the state of Alabama would have ordered all blacks to leave the city; indeed, that is almost precisely what occurred. *Id.* at 341. Cf. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the exclusion of individuals of Japanese ancestry from the coastal areas of the western United States during World War II); *Loving v. Virginia*, 388 U.S. 1 (1967) (banishing a couple from Virginia as punishment for violating Virginia's anti-miscegenation statute). *Hunter*, on the other hand, was not an equality claim; rather, it was founded on the due process "right" to be governed by one particular local government instead of another. *Hunter*, 207 U.S. at 176-77. The former, not so incidentally, had a lower tax rate. The question in *Hunter* was then really about money. Thus, *Hunter* was in a very real sense *Lochner* all over again, but without the force of the "liberty to

volved a dispute between two groups of citizens regarding which local entity should govern them. The state, in permitting annexation by a simple rather than a concurrent majority, mediated that dispute in favor of those who resided in the larger community. The Court saw no reason to overturn that decision; it respected the state's choices. From that, it follows that the Court ought to respect (by not impeding) a state's decision to delegate both service distribution functions and the necessary fiscal powers to local governments. *Lincoln County* does not do that; at the very least, it imposes a cost on the state for exercising that choice.

Answering that argument is not easy. Certainly, as a theoretical matter, the liability of a local political subdivision makes certain services more expensive when compared to a world of no liability if the service is provided by the state, even if the only cost is that of obtaining insurance. On an empirical level, however, it would be difficult to demonstrate that *Lincoln County* has in any way inhibited or even influenced the states' choices about whether to delegate powers or retain them. Both intuition and statistics suggest that local political subdivisions have proliferated in this century despite *Lincoln County*.²⁰² So, while it is easy to argue that *Lincoln County* interferes with a state's choices about how to structure its essential governmental operations,²⁰³ it is difficult to demonstrate that the argument is anything but a theoretical construct. A potential threat to state autonomy, which in more than one hundred years has not panned out, hardly seems like much of a threat at all.

C. Local Autonomy and Principles of Self-Governance

Light might be shed on some of the questions left unanswered by a functional analysis²⁰⁴ if function is redefined to focus on a local government's political role rather than its service distribution or regulatory role. As noted above, those who argue that our constitu-

contract" argument.

202. Between 1942 and 1987 (the earliest and latest figures available), there was a 46.3 percent decline in the number of local governmental units, with the largest decline occurring between 1942 and 1952. 1 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1987 CENSUS OF GOVERNMENTS: GOVERNMENTAL ORGANIZATION 1 (1988) [hereinafter CENSUS OF GOVERNMENTS]. This was due almost exclusively to school district consolidations, which reduced the number of those units by more than one-half. *Id.* at VI. Between 1972 and 1987, however, the number of local governmental units increased. *Id.*

203. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981).

204. See *supra* note 149-52 and accompanying text (discussing functional analysis).

tional structure was informed more by a collective than an individual view of human self-fulfillment²⁰⁵ look upon local government as the venue in which essential political discussions must occur.²⁰⁶ Thus viewed, it may be plausibly argued that those local entities which are truly political, which have the redistributive regulatory and/or taxing powers requiring equal per capita voting, ought to be entitled to Eleventh Amendment protection.²⁰⁷ Like states, these entities have certain prerogatives, discretion if you will, to decide how and to what extent the needs of their constituents will be satisfied. This is true whether the entity is operating under Dillon's Rule or under home rule.²⁰⁸

Lincoln County, then, is inconsistent, at least in theory, with republican principles of local self-governance in two ways. First, *Lincoln County* implicitly expresses a preference for governance at the state rather than the local level. It does so by immunizing the state, but not the local treasury, from attachment by the court of another sovereign. In so doing, it leaves the state far greater policy and implemental options than it leaves the local political subdivisions.

Second, as Gordon Clark notes, "For local autonomy to have any strength, there must be a sphere of local *immunity*."²⁰⁹ Immunity for Clark is not limited to the immunity from federal court judg-

205. See, e.g., GORDON L. CLARK, JUDGES AND CITIES 27-32 (1985) (discussing the structuralist position where community associations bring about meaning as human beings); J.G.A. POCKOCK, THE MACHIAVELLIAN MOMENT (1975) (discussing the Machiavellian era and its legacy of balanced government, the republic, and citizen participation); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969) (discussing and explaining the creation of the American republican Constitution and the American political system); Frank I. Michelman, *The Supreme Court, 1985 Term-Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1987) (arguing for a dialogue in support of judicial practical reason as an aspect of judicial self-government in the interest of freedom); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Republican Revival*] (exploring aspects of republicanism and how it can support group or proportional representation).

206. See *supra* note 14 (expressing the view that republicanism is best expressed in that level of government which permits the maximum level of participation). It is likely that Public Choice theorists would disagree that local government, rather than state government, is the appropriate unit for defining and articulating the "public good" because of the local government's peculiar susceptibility to "one-sided lobbying." They would indeed quarrel with the very concept of "public good." See Clayton P. Gillette, *In Partial Praise of Dillon's Rule, Or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991) (arguing that Dillon's Rule functions as a check on local governments' tendency to cater to special interests at the expense of other constituents).

207. Durchslag, *Reappraising the Right*, *supra* note 149.

208. CLARK, *supra* note 205, at 70-75 (noting that sovereignty is frequently not absolute, but rather a matter of degree). See *supra* note 72 and accompanying text (describing Dillon's Rule).

209. CLARK, *supra* note 205, at 7.

ments contemplated by the Eleventh Amendment. Rather it is, more broadly, the ability of a local political subdivision to make political decisions without the fear that those decisions will be revised by a higher authority. Even within the limited sphere of immunity contemplated by the Eleventh Amendment, the municipality is subject to greater revisionary actions by the federal court than is the state.²¹⁰

The question is whether these factors necessarily dictate that *Lincoln County* be reconsidered. Certainly, a second look at Eleventh Amendment municipal immunity would be consistent with the efforts of those constitutional scholars who have been attempting to mesh constitutional theory²¹¹ and doctrine²¹² with the historical insights provided by J.G.A. Pocok, Gordon Wood, and others. There is certainly enough ammunition to do so, even though much of the ammunition is not easily adaptable to the rifling on the weapon. Nor, I suppose, should the fact that a significant amount of disagreement still exists about whether such a venture is appropriate²¹³ be an impediment to a reconsideration of *Lincoln County*. The holding, after all, has little foundation other than the general state of the law regarding state/local structural relationships. However, state law does not necessarily dictate results under the Eleventh Amendment. This is evidenced by the Court's holding that a state's general waiver of sovereign immunity "in any court of competent jurisdiction" does not waive that state's Eleventh Amendment immunity.²¹⁴

210. A clear example of this is the availability of the "state action" defense to a state or state entity under *Parker v. Brown*, 317 U.S. 341 (1943). *Parker* held, among other things, that private, noncompetitive behavior is immune from the federal antitrust laws if done pursuant to state regulatory policy, absent a clearly expressed federal policy to the contrary. *Id.* The same defense, however, is not available to local governments. In order for local governments to assert the *Parker* defense, the local government must demonstrate that its actions "constitute the action of the State . . . itself in its sovereign capacity, . . . or . . . municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy . . ." *Community Communications Co. v. Boulder*, 455 U.S. 40, 52 (1982). *But cf. Town of Hallie*, 471 U.S. 34 (1985) (holding that a city's anticompetitive activities were protected by a state action exemption to federal antitrust laws); *see also supra* note 182 (explaining the issues involved in *Hallie*).

211. *See, e.g., TUSHNET, supra* note 14 (discussing republican federalism); Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983 (1990) (applying the classic virtue of "liberality" rather than a rights theory to a discussion of claims for retribution).

212. *See, e.g., Hoke, supra* note 14 (proposing a fundamental restructuring of the preemption doctrine by reconsidering federalism in light of direct participation in the political process).

213. *E.g., Steven G. Gey, The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801 (1993); Fallon, *supra* note 14.

214. *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946). The Court, however, would recognize an explicit waiver of Eleventh Amendment immunity in federal court as a waiver

There are at least two difficulties with relying on republican notions of self-government as the primary theoretical basis for reconsidering *Lincoln County*. First, many local political subdivisions which possess both the indicia of political bodies and have the requisite independence from the state, either in terms of the initiative and/or immunity²¹⁵ necessary to avoid doing total violence to whatever sense the Eleventh Amendment has, are not the kind of local governing authorities in which political discussions concerning civic virtue are likely to occur; they are simply too large. As Kathryn Abrams aptly noted, "If accessibility and identifiability of common norms are crucial, it may be useful to start at the sub-local or neighborhood level."²¹⁶ However, there are few such sub-local entities sufficiently political to justify distinguishing them from water storage districts or transit authorities. Those that are, such as neighborhood school boards in New York or Chicago, are hardly examples of venues in which the "community good" has been systematically pursued.

Second, and more important, there are costs entailed in revising Eleventh Amendment doctrine to equate states and local political subdivisions. It is to that issue which the next and last section of this Article turns.

IV. ELEVENTH AMENDMENT AUTONOMY AT A COST

If Eleventh Amendment immunity is extended to local political subdivisions, there will be an unfortunate "tradeoff:" the cause of individual liberties will likely suffer a serious setback. The Court in *Monell v. Department of Social Services*²¹⁷ held that the word "person" in Section 1983 of the Civil Rights Act²¹⁸ includes municipalities and other local political subdivisions.²¹⁹ The Court's decision was based on a reading of the congressional history of the 1871 Civil Rights Act which it said demonstrated that the Court's holding accurately reflected congressional intent. In reaching this deci-

of a state's Eleventh Amendment immunity.

215. See CLARK, *supra* note 205, at 60-75 (discussing several cases illustrating this view).

216. Abrams, *supra* note 14, at 1606. *But cf.* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) [hereinafter Michelman, *Law's Republic*] (stating that the Court itself can be the focus of a republican discourse of law and suggesting that "jurisgenerative politics" provides a check against a pluralist political society).

217. 436 U.S. 658 (1978).

218. 42 U.S.C. § 1983 (1988).

219. *Monell*, 436 U.S. at 669-90.

sion, the Court read congressional intent far differently than did the Court in *Monroe v. Pape*,²²⁰ which held that "person" was not intended to include political subdivisions.²²¹ As a result of *Monell*, individuals can sue local governments for damages resulting from federal constitutional and statutory violations. *Lincoln County* precludes any argument for immunity based on the Eleventh Amendment.

This is not true of an individual's right to recover damages from the state for similar constitutional or statutory violations. First, *Quern v. Jordan*²²² held that Section 1983 is not sufficiently explicit in its intention to waive the states' Eleventh Amendment immunity.²²³ Ten years later, in *Will v. Michigan State Police*,²²⁴ the Court went even further, holding that states are not "persons" within the meaning of Section 1983, thus precluding a Section 1983 claim in state as well as federal court.²²⁵ Absent an explicit statement from Congress creating an individual claim for damages against the state,²²⁶ an individual's only recourse is to sue a state

220. 365 U.S. 167 (1961), overruled by *Monell*, 436 U.S. 658 (1978).

221. *Monroe*, 365 U.S. at 191-92.

222. 440 U.S. 332 (1979).

223. *Id.* at 345.

224. 491 U.S. 58 (1989).

225. *Id.* at 71.

226. See, e.g., *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) ("Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of the law, evidence of congressional intent must be both unequivocal and textual."). The idea that Congress can waive a state's Eleventh Amendment immunity is generally supported by Eleventh Amendment scholars. See, e.g., Field, *Congressional Imposition*, *supra* note 43 (addressing Congress's power to overrule state immunity); Massey, *supra* note 43 (stating that Congress can waive immunity except to the extent that the Eleventh Amendment prohibits it); Nowak, *supra* note 43 (analyzing the Eleventh Amendment's failure to draw distinctions between Congress's power to create a private cause of action and judicial power to imply such a cause of action); Laurence Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976) (arguing that the ultimate authority in determining intergovernmental immunity should be reserved to Congress); cf. George D. Brown, *Beyond Pennhurst — Protective Jurisdiction, The Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985) (stating that Congress has authority to overrule *Pennhurst II*). *Contra*, Joseph J. Jablonski, Jr., *The Eleventh Amendment: An Affirmative Limit on the Commerce Clause Power of Congress — A Doctrinal Foundation*, 37 DEPAUL L. REV. 547 (1988) (arguing that Eleventh Amendment doctrine creates a positive restriction on Congress's power under the Commerce Clause). The Court has held that Congress can waive a state's Eleventh Amendment immunity when legislating under § 5 of the Fourteenth Amendment. *Dellmuth*, 491 U.S. at 227; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 446 (1976). Whether Congress has the same authority when acting pursuant to its Article I powers now may be in some doubt, as four members of the Court said that Congress does have such authority in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-23 (1989). Four Justices, however, disagreed. *Id.* at 35-36 (Scalia, J., concurring in part and dissenting in

officer under *Ex Parte Young*²²⁷ to enjoin *further* violations of her federal constitutional liberties. This cuts off the primary statutory device by which individuals can be made whole when the state fails to adhere to federal constitutional norms.²²⁸ Now the punch line is obvious; if local political subdivisions are treated as states for purposes of Eleventh Amendment immunity, that decision, by itself, would overrule *Monell* and thus immunize all political subdivisions from damage claims in *federal court* for violations of federally protected liberties.²²⁹

It is possible to reassert *Monell* in the context of current Eleventh Amendment doctrine by arguing that it established Congress's intent in Section 1983 to waive local, as opposed to state, Eleventh Amendment immunity. The Court's opinion in *Atascadero State Hospital v. Scanlon*²³⁰ makes that argument problematic. The Court in *Atascadero* held that if Congress is to waive a state's Eleventh Amendment immunity, it must "mak[e] its intention unmistakably clear in the text of the statute."²³¹ The *Monell* Court relied on legislative history, not statutory text, in reaching the determination that local political subdivisions are "persons" for purposes of Section 1983. Moreover, even if it would be permissible to rely on legislative history to assist in interpreting ambiguous statutory language, that legislative history, as indicated by *Monroe*, is hardly "unmistakable."

This state of affairs might not be so bad. First, the cause of civil

part). Since *Union Gas* was decided, two members of the plurality, Justices William Brennan and Thurgood Marshall, have resigned. See generally Jackson, *One Hundred Years of Folly*, *supra* note 22, at 62-76 (analyzing the *Union Gas* decision and Brennan's opinion supporting Congress's power to abrogate state immunity).

227. 209 U.S. 123 (1908) (permitting federal courts to enjoin unconstitutional state policies and practices).

228. Since states are not persons within the meaning of § 1983 of the Civil Rights Act, claims in state court are precluded as well. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

229. See Michael J. Gerhart, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539 (1989) (arguing that there is a significant overlap between the Eleventh Amendment and the Court's treatment of local political subdivisions under § 1983). If the Court were to overrule *Lincoln County* because it was wrongly decided, even by 1890 understandings, it might use the reasoning found in *Will*, — "in deciphering congressional intent as to the scope of [Section] 1983, the scope of the Eleventh Amendment is a consideration. . .," to hold that local political subdivisions, like states, are not persons within the meaning of § 1983. *Will*, 491 U.S. at 66-67. The fact that *Hans* was decided after Congress enacted § 1983 was unimportant to the Court's "historical" analysis in *Will*. *Id.* at 66 n.6. Presumably, it would be equally unimportant if the Court were to overrule *Monell*.

230. 473 U.S. 234 (1989).

231. *Id.* at 242; see also *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (citing *Atascadero*).

liberties have survived, even flourished, despite state Eleventh Amendment immunity. Why should they not equally survive after extending Eleventh Amendment immunity to political subdivisions? Second, Eleventh Amendment immunity is limited; all that it does is prohibit actions for damages against the state. *Ex Parte Young*,²³² fiction though it is, still permits a federal court to enjoin unconstitutional policies and practices. This will not change simply because we extend Eleventh Amendment immunity to local governmental units.

The first argument is factually correct. Indeed, if the issue were survival, the argument would be unassailable. However, if the issue is whether a rule — one which is certainly not compelled by any rationale of the Eleventh Amendment — should be adopted if there will be a clear sacrifice to individual liberties, a “yes” answer becomes difficult. More importantly, there will have to be some sacrifices. There are fifty states, and the number of local political subdivisions which have the kind of regulatory, taxing, and enforcement powers which give rise to claims of unconstitutional excesses approaches 54,000.²³³ This, coupled with the fact that states have delegated more and more of the day-to-day regulation and service functions of government to a variety of local political subdivisions means that the individual is more likely to encounter a local than a state official.²³⁴ Everyone from the police and fire officer to the welfare case worker to the nurse at the local public hospital is more likely to be on the local payroll than that of the state. Consequently, the chances of an individual encountering unconstitutional behavior from a local official are far greater than the chances of encountering similar behavior by a state officer. If we are going to have an effective federal incentive to comply with federal constitutional norms, and actions for damages in some way serve as such an incentive,²³⁵

232. 209 U.S. 123 (1908) (holding that the Eleventh Amendment does not prevent federal courts from issuing an injunction against state officials).

233. The actual figure is 53,654. CENSUS OF GOVERNMENT, *supra* note 202, at VI. This includes counties, municipalities, townships, and school districts. *Id.* Excluded from this figure are 29,532 special districts such as water districts, sewer districts, and fire protection districts. *Id.* Ordinarily these districts have relatively few employees, and their powers are not those which in their ordinary day-to-day operations give rise to violations of constitutional liberties.

234. As of October 1987, there were nearly 2.5 times more local government employees than state employees. 3 CENSUS OF GOVERNMENT, *supra* note 202, at V. Of these, only 529,000 — about five percent — are employed by special districts. *Id.* at VI. The rest are employed by municipalities, counties, townships, and school districts, with most being employed by school districts and municipalities. *Id.*

235. *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980). See also *TRIBE, CONSTITUTIONAL LAW*, *supra* note 59, § 3-25, at 173 (stating that “[t]he Eleventh Amendment lies at the

it is more important to apply that incentive at the local level, where the most significant impact is likely to be felt.

Why are actions for damages needed at all so long as the federal courts are open to equitable relief? After all, it was injunctive relief which desegregated our local schools,²³⁶ improved our local penal institutions,²³⁷ prevented local governments from unduly burdening rights of choice,²³⁸ and ensured that racial and political gerrymandering do not limit equal participation rights.²³⁹ The simple answer is that injunctions are not always available. As *Rizzo* told us, federalism concerns may prevent injunctive relief, leaving damages against the local political subdivision as the only effective remedy for seemingly random, yet pervasive abuses by individual police officers.²⁴⁰

Finally, while a Section 1983 damage claim against the offending local official will exist regardless of the way in which the Eleventh Amendment is interpreted, that is not a terribly satisfactory remedy for one concerned with ensuring that abuses do not become systemic. In addition to all the reasons that generally support imposing

center of the tension between state sovereign immunity and the desire to have in place mechanisms for the effective vindication of federal rights"); Barbara R. Snyder, *The Final Authority Analysis: A Unified Approach to Municipal Liability Under Section 1983*, 1986 Wisc. L. REV. 633, 659 (discussing the theory that the final authority test to municipal liability under § 1983 serves to deter and compensate). The conventional wisdom of subjecting local governments to liability without fault under § 1983 has been disputed by Professor John Jeffries. John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82 (1989). Professor Jeffries rejects the usual justifications for compensating people for governmentally inflicted constitutional wrongs; he prefers instead to rest on "corrective justice." *Id.* at 93. This requires an assessment of fault, a direct contradiction of the result in *Owen*.

236. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 2 (1971).

237. *E.g.*, *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976).

238. *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), *overruled in part by Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

239. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (racial gerrymandering); *Davis v. Bandemer*, 478 U.S. 109 (1986) (political gerrymandering).

240. *Monell's* requirement that the plaintiff prove a policy or custom before a municipality can be held liable make damages against municipalities difficult to prove under the circumstances posited in the text. See generally Gerhart, *supra* note 229 (stating that the policy or custom requirement is the device by which the court balances the need to vindicate federal constitutional violations with concerns for local autonomy). The gap which some litigants tried to open in the policy or custom requirement, holding a political subdivision liable for failing to adequately train its employees, was largely closed by *Canton v. Harris*, 489 U.S. 378 (1989). The *Canton* Court held that inadequate police training could be the basis of a Section 1983 action only where the failure to train evidenced a "deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. The Court's reason for limiting liability so severely was to remain consistent with the more general policy and custom requirement. *Id.* at 389.

liability on a principal when its agent has engaged in mis- or malfeasance,²⁴¹ a claim against an individual official is subject to the defense that she reasonably believed that her actions were constitutionally permissible,²⁴² but such defense is not available to the local governmental unit.²⁴³

True adherents to classical republicanism, those who eschew judicial protections in favor of the protections afforded by a deliberative political process, might well find this state of affairs unobjectionable. Certainly civic virtue would include collective responsibility for collective wrongdoing, probably even collective negligence. Suffice it to say that my optimism for political decision-making, even (maybe most certainly) at the most local of levels, stops well short of that point. It is important to temper devotion to political discourse with a healthy dose of rights-based liberalism enforced by judicial review, including the availability of monetary damages.²⁴⁴

241. HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 52, at 104 (2d ed. 1990); *RESTATEMENT (SECOND) OF AGENCY* § 219 cmt. a (1958).

242. *Pierson v. Ray*, 386 U.S. 547 (1967).

243. *Owen v. City of Independence*, 445 U.S. 622 (1980).

244. See Michelman, *Law's Republic*, *supra* note 216 (contending that through a reconsideration of republican constitutional thought, we can achieve a government of both people and laws); Sunstein, *Republican Revival*, *supra* note 205, at 1551, 1569-71, 1579-81 (arguing that republican theories are not hostile to the protection of individual or group autonomy from state control).

